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Supreme Court of the United States

OCTOBER TERM, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR AND M. M. O'GARA, PETITIONERS,

vs.

LEOLA JACKSON

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1952
CERTIORARI GRANTED MARCH 9, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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OLIVE B. BARROWS, RICHARD PIKAAR AND M. M. O'GARA, PETITIONERS,

vs.

LEOLA JACKSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 574475

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKARR AND M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, DOE ONE, DOE TWO AND DOE THREE, Defendants

SECOND AMENDED COMPLAINT—DAMAGES FOR BREACH OF CONTRACT—Filed February 13, 1951

Plaintiffs complain of defendants and for cause of action allege as follows:

I

That the defendants sued herein as "Does" are sued by said fictitious names for the reason that the plaintiffs do not at the present time know their true names; that when same are ascertained plaintiffs will ask leave of court to amend their complaint by inserting the true names for said fictitious names whenever they may appear.

II

That at the time of the breach of contract hereinafter alleged and complained of and at all other times hereinafter referred to plaintiffs Olive B. Barrows and Edgar W. Barrows were and now are the owners and occupants of the residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 46, Tract 1462, as per map recorded in Book [fol. 2] 20, Page 17 of Maps in the office of the County Recorder of said County; that at the time of the breach of contract hereinafter alleged and complained of and at all other times herein referred to unless otherwise stated, plaintiff Richard Pikaar was and now is the owner and occupant of the residential real property located in the City of Los

Angeles, County of Los Angeles, State of California, described as Lot 5, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of said County; that at the time of the breach of the contract hereinafter alleged and complained of and at all other times herein referred to plaintiff M. M. O'Gara was and now is the owner of the residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 42, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of said County.

III

That on or about the 21st day of October, 1944, Leola Jackson, was the owner of certain residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 47, Tract 1462, as per map recorded in the office of the County Recorder in said County; that plaintiffs are informed and believe and upon such information and belief allege that the defendant Leola Jackson continued to be the owner of said real prop-
[fol. 3] erty until the 2nd day of February, 1950; that defendant Leola Jackson is a resident of the County of Los Angeles, State of California.

IV

That on or about the 21st day of October, 1944, each of the above named plaintiffs, except plaintiff Richard Pikaar, and the defendant Leola Jackson, in consideration of the mutual benefit to the said property owners and their respective properties, executed an "Agreement Imposing Restrictions", (hereinafter referred to as Agreement) respecting the said real properties owned by the respective signers; that on or about the 21st day of October, 1944, the ancestors in title of the above named plaintiff Richard Pikaar were the owners of said Lot 5, that said ancestors in title of the above named plaintiff Richard Pikaar executed said Agreement for said consideration; that said Agreement was caused to be recorded on the 8th day of May, 1945, in Book 21896 at page 373 of the official records of Los Angeles County, State of California.

V

That by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white [fol. 4] or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively engaged in such employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described.

VI

That said Agreement further provided that if any of the said lots of real property hereinbefore described should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, then in that event the covenantor who covenanted as to that lot, or his heirs, executors, administrators, successors, or assigns, would immediately become liable to those covenantors, their heirs, executors, administrators, successors, or assigns, whose lots were not so occupied for all damages which they may have suffered by reason of the breach *of* thereof.

[fol. 5]

VII

That said Agreement further provided that if any actions were brought for the breach or violation of said contract against those who caused, committed or permitted the breach thereof, the court should, in addition to the damages which may have been sustained by the plaintiffs, assess against the parties causing, committing, or permitting the breach thereof, a reasonable amount of attorney's fees and

court costs incurred in any proceedings brought because of the breach of said contract.

VIII

That all lots of real property referred to herein were described in said agreement and became restricted by said agreement.

IX

That the defendant Leola Jackson moved out of the house on said Lot 47 on or about the 3rd day of September, 1950; that plaintiffs are informed and believe and therefore allege that persons not of the Caucasian race moved into this said lot and began to use and occupy the same on or about the 4th day of September, 1950; are informed and believe and therefore allege that when defendants Leola Jackson moved out of the house on said Lot 47, she did so in order to permit persons known to her to be other than the Caucasian race to move into and occupy said house, and with the intention that persons not of the Caucasian race should move into [fol. 6] and occupy said house, all in the breach of said Agreement; that the plaintiffs are informed and believe and upon such information and belief allege that the defendant Loela Jackson, in violation of said Agreement, has permitted persons not wholly of the white or Caucasian race to occupy the said real property hereinabove described as Lot 47, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of Los Angeles County, State of California, and that the occupancy of the said premises by said persons not wholly of the white or Caucasian race is for residence and not by servants or other employees of the owners or tenants of said real property.

X

That on or about the 2nd day of February, 1950, defendant Leola Jackson and one Dorothy May Grace executed a grant deed recorded in Book 32918, Page 213, of the records of the County Recorder of Los Angeles County, State of California; that said grant deed conveyed the said Lot 47 to Pearnell Smally and Florine Smally, his wife, as joint tenants; that defendant Leola Jackson failed to incorporate

in said deed the restriction contained in said Agreement against use and occupancy by persons not wholly of the white or Caucasian race; that defendant Leola Jackson failed to incorporate in said deed any restriction or any reference to said Agreement, all in breach of said Agreement.

[fol. 7]

XI

That as a direct and proximate result of the acts and conduct of defendant Leola Jackson, the property of plaintiffs Olive B. Barrows and Edgar W. Barrows has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of plaintiffs Olive B. Barrows and Edgar W. Barrows in the sum of Three Thousand One Hundred Dollars ($3,100.00).

XII

That as a direct and proximate result of the acts and conduct of the defendant Leola Jackson the plaintiffs herein have been obliged to employ attorneys for the purpose of instituting and prosecuting this action and have employed John C. Miles and J. Wallace McKnight, attorneys at law, for such purpose, have incurred costs and expenses in connection therewith, the exact amount of which is not known to the plaintiffs at this time, and plaintiffs will ask leave of court to amend this complaint and add the same when said costs and expenses for attorney's fees, etc., becomes known.

For a Second, separate and distinct Cause of Action, Plaintiffs complain and allege as follows:

I

Repeat by reference thereto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XII of the First Cause of Action [fol. 8] with like force and effect as if the same were herein set forth in full.

II

That when plaintiff Richard Pikaar purchased the lot owned by him, as alleged in Paragraph II hereof, said plaintiff did so with the knowledge of and reliance upon the terms of said Agreement, and in the knowledge and belief

that the premises described herein would at no time prior to the expiration of said Agreement in the year 2043, be used or occupied or permitted to be used or occupied as residence by any person or persons not wholly of the white or Caucasian race, except employees or servants of the occupants or owners of said premises.

III

That as a direct and proximate result of the acts and conduct of the defendant Leola Jackson, the property of plaintiff Richard Pikaar has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of Richard Pikaar in the sum of Four Thousand Dollars ($4,000.00).

For a Third, separate and distinct Cause of Action Plaintiffs complain of Defendant as follows:

I

Repeats by reference thereto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX; X and XII of the First Cause of Action above with like force and effect as if the same were herein [fol. 9-10] set forth in full.

II

As a direct and proximate result of the acts and conduct of defendant Leola Jackson, the property of plaintiff M. M. O'Gara has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of the plaintiff M. M. O'Gara in the sum of Four Thousand Five Hundred Dollars ($4,500.00).

Wherefore, plaintiffs pray judgment against the defendant as follows:

(1) In the sum of $3,100.00 for damage to plaintiffs Olive B. Barrows and Edgar W. Barrows;

(2) In the additional sum of $4,000.00 for damage to plaintiff Richard Pikaar;

(3) In the additional sum of $4,500.00 for damage to plaintiff M. M. O'Gara;

(4) For reasonable attorney's fees;

(5) For costs of suit incurred herein;

(6) Such other and further relief as may be meet and proper in the premises.

John C. Miles and J. Wallace McKnight, By J. Wallace McKnight, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 11] In Superior Court of Los Angeles County

Separate Demurrer of Defendant Leola Jackson to Second Amended Complaint—Filed February 23, 1951

Comes now the Defendant Leola Jackson, and appearing for herself and herself alone, demurs to the Second Amended Complaint on file herein, and for grounds of demurrer states:

I

Said Second Amended Complaint does not state facts sufficient to constitute a cause of action.

II

Said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

III

The First Cause of Action of said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

IV

The Second Cause of Action of said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

[fols. 12-13]

V

The Third Cause of Action of said second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

VI

Said Second Amended Complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

Said Second Amended Complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States.

Wherefore, this demurring defendant prays that her Demurrer to the Second Amended Complaint on file herein be sustained without leave to amend; that said Second Amended Complaint be dismissed; and that judgment be rendered in favor of this demurring defendant, together with her costs.

Sims & Wallbert. By Maurice H. Wallbert, Attorneys for Demurring Defendant.

[File endorsement omitted.]

[fol. 14] In Superior Court of Los Angeles County

Memorandum Opinion Re Ruling on Demurrer to Second Amended Complaint—March 26, 1951

By this action, plaintiffs seek damages from defendants for violation of race restriction covenants both in permitting the use of land subject to the covenant by persons not of the Caucasian race and also in failing to incorporate in the deed to such non-Caucasians a restriction against use and occupancy by non-Caucasians.

Defendant Leola Jackson's demurrer to the second amended complaint on the ground that it fails to state a cause of action thus squarely presents the question whether a California court may entertain such a suit.

All of the previously decided cases on this subject must be reappraised in the light of the recent decisions of the United States Supreme Court in *Shelley v. Kraemer*, 334 U. S. 1, and *Hurd v. Hodge*, 334 U. S. 24, both rendered in 1948.

In *Shelley v. Kraemer*, supra, the court announced the broad principle that State courts may not enforce such race restriction covenants, for by so lending the judicial arm of governmental authority to the effectuation of racial discrimination, a violation of the equal protection clause contained in the Fourteenth Amendment to the federal Constitution results. The type of judicial enforcement sought [fol. 15] in *Shelley v. Kraemer* was by way of injunction to restrain certain colored purchasers from taking possession of the premises covered by the covenant and to revest title in their grantor, and although the Supreme Court of Missouri had held such action to be proper, the Supreme Court of the United States reversed the Missouri decision for the reason stated.

Plaintiffs in the present action justify their efforts to seek judicial enforcement of race restriction covenants on the ground that the rule laid down in *Shelley v. Kraemer* should be limited to actions for injunctive relief and should not be applied to suits for damages against the white grantors who sold their property to non-Caucasians without including a race restriction covenant in the deeds of conveyance.

Altogether apart from the contention of plaintiffs that the United States Supreme Court did not intend by its ruling in *Shelley v. Kraemer* to foreclose a suit for damages for violation of a race restriction, it is extremely doubtful if plaintiffs' complaint states a good cause of action against the defendant vendors. For ever since the decisions in 1919 of *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, and *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, the law of this State without deviance has been that restrictions on the sale of property to non-Caucasians are invalid, and the aura of legality has been cast about race restric- [fol. 16] tions against *use* by the non-Caucasian. Therefore, it is difficult to see how a white vendor, whose *sale* of the property to a colored person is legal may be held legally responsible in damages for the subsequent *use* of the prop-

erty in contravention of the covenant, for the *use* of the realty is that of the purchaser not of the vendor.

Plaintiffs apparently recognize the weakness of their position in this regard, for they also rely on the failure of the defendant Jackson to include in her deed to the non-Caucasian purchaser a covenant restricting use of the premises to Caucasians. Under the pleadings, however, such omission on the part of Leola Jackson would appear to be immaterial, inasmuch as the complaint alleges the execution and *recordation* of a general race restriction agreement covering the property involved in this suit, creating a covenant running with the land as to all such property restricting its use to non-Caucasians. For a covenant so recorded, if valid, is binding upon all future purchasers who take their property subject to the constructive notice imparted by the recordation, even if the deed by which they acquired title contained no such recital. (*Wayt v. Patee*, 205 Cal. 46, 52-54; *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 237, 238.)

Plaintiffs' action for damages, therefore, if any such action is subject to judicial recognition, more properly lies against the non-Caucasians who actually are violating the [fol. 17] express provision of the continuing covenant by their use of the property. Plaintiffs' counsel concedes that his "Research has failed to disclose any case in California in which plaintiffs have sought remedy in damages (against the white vendors) rather than by injunction." In all probability, the reason why no such cases have been found is because, as heretofore illustrated, the white vendor is not violating the covenant by any *use* of the premises.

My basic reason for concluding, however, that plaintiffs' seconded amended complaint states no cause of action that may be judicially recognized rests on constitutional grounds. A reading of *Shelley v. Kraemer*, supra, and *Hurd v. Hodge*, supra, convinces me that the United States Supreme Court intended by its pronouncements therein to preclude State courts from giving judicial recognition to and enforcement of race restriction covenants contained in private agreements, whether such judicial enforcement be by way of injunction, declaratory relief, damages or any other type of action in which the remedy is predicated upon

a judicial holding, express or implied, that such a covenant is valid.

Thus although in *Shelley v. Kraemer*, the action was for injunction, the Supreme Court nowhere indicates that its rule of decision is limited to actions for an injunction to restrain the non-Caucasians from taking possession of and using the premises subject to the covenant. On the con- [fol. 18] trary, the language of the Court uniformly throughout the course of its opinion refers generally to the "validity of *court enforcement*" of private restrictive covenants, "that *judicial enforcement* of the restrictive agreements" violates the Fourteenth Amendment of the Federal Constitution, that the question involved was "Whether the equal protection clause of the Fourteenth Amendment inhibits *judicial enforcement* by state courts of restrictive covenants based on race or color," and again that "the constitutional issues presented by these cases . . . raise the question of the validity, not of the private agreements as such, but of the *judicial enforcement* of those agreements." (Emphasis added.)

The holding of the Supreme Court in *Shelley v. Kraemer*, supra, may be summarized as follows: "These are cases in which the purposes of the (race restriction) agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements" (334 U. S. at pp. 13, 14); judicial enforcement of such private agreements is action by the state, and "in granting judicial enforcement of the race restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." (334 U. S. at p. 20.) By way of further emphasis, the Supreme Court declared that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection [fol. 19] of the laws to other individuals." (334 U. S. at p. 22.)

Shelley v. Kraemer, therefore, in my mind, clearly establishes the major premise of the syllogism upon which my ruling on demurrer is predicated, that is: *Judicial enforcement of race restriction covenants by state courts is state action violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.*

property, his constitutional rights are satisfied.[2] He does not have the right of eminent domain in the property of others.

Cases involving the direct and proven effect of restricted membership in quasi-public service monopolistic organizations upon non-consenting individuals before the court as parties to the litigation[1] should not be cited in this action

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[1] *James v. Marinship Corp.*, 25 Cal. 2d 721.

between private individuals based upon a purely private contract and involving the sanctity of the homes of the contracting parties. Surely, no one has rights in these homes superior to the rights of the owners who were parties to this contract. Judgment for appellants could not deny respondent equal protection of the law and could [fol. 262] have only very slight effect on anyone and that speculative and uncertain. The constitutional right to contract should outweigh such speculative and uncertain considerations.

The District Court of Appeal in Note 17 of the opinion herein cites *Re Wren*, Ont. R. 778, 4 D. L. R. (1945) 674, which is the opinion of a trial judge of Ontario, Canada. That opinion was cited and completely repudiated by the Court of Appeal of Ontario in *Re Noble & Wolf*, Ontario Weekly Notes, 1949, at page 484. We quote from page 487 of the Ontario Weekly Notes, 1949:

> "Henderson J. A. after stating the facts, said that in his opinion the reasons for judgment of Schroeder, J. were right, and the judgment in Re Drummond Wren, *supra*, was wrong in law and should not be followed."

We further quote from page 488 of Ontario Weekly Notes, 1949:

> "Hope J. A. said he agreed fully with Robertson C. J. O. and with the conclusion reached by other members of the court. In view of the reliance placed on the decision in Re Drummond Wren, *supra*, his Lordship wished to add that in his opinion freedom of the individual in and under a democracy had implicit in

The minor premise of my syllogism is: *For a California court to award damages for the breach of such a race restriction covenant would result in judicial enforcement of the discriminatory covenant by state action.*

The conclusion of this syllogism therefore would be: *For a California court to award damages for the breach of a race restriction covenant would be violative of the equal protection clause of the Fourteenth Amendment.*

That the language of the Supreme Court in *Shelley v. Kraemer* is broad enough to contemplate an action for damages for breach of the covenant as coming within the scope of "judicial enforcement" as referred to in that opinion, thereby sustaining my minor premise, has been specifically held in *Roberts v. Curtis*, 93 F. Supp. 604 (1950). In the latter case, the federal district judge, after citing *Hurd v. Hodge*, supra, and *Shelley v. Kraemer*, supra, observed: "I construe the ruling of the Supreme Court as withholding any assistance by way of judicial [fol. 20] action of any kind from the enforcement of such restrictive covenants."

Plaintiffs would avoid the effect of the foregoing conclusion by claiming that the Supreme Court in *Shelley v. Kraemer* held the restrictive agreement standing alone to be valid. They then argue that since the agreement is valid and since the action is only against white defendants, no question of racial discrimination is involved, and an action for damages for breach of the agreement will lie. The decision of the Missouri Supreme Court in *Weiss v. Leaon*, 225 S. W. 2d 127, rendered after the reversal of its prior decision by the United States Supreme Court in *Shelley v. Kraemer*, supra, draws the same distinction as urged by plaintiffs herein.

In my opinion, however, both plaintiffs and the Missouri Supreme Court in *Weiss v. Leaon*, supra, proceed upon an ill-founded premise that the agreements are legal. Such certainly was not the holding of the Supreme Court in *Shelley v. Kraemer*, supra. The language of the Court in that case which apparently has been misconstrued by many readers of the decision concerns the discussion by the Court of the necessity for state action to be involved before a discrimination under the Fourteenth Amendment can occur. Thus the Supreme Court carefully points out that the

Fourteenth Amendment to the federal Constitution is restrictive solely of State governmental action and does not apply to purely private action, observing that "That [fol. 21] amendment erects no shield against merely private conduct, however discriminatory or wrongful." (334 U. S. at p. 13.) And previously, at page 9 of its opinion, the Court had adverted to the necessity for state action by way of judicial enforcement to enter the case before a federal question would be raised, of which the Supreme Court could take cognizance.

In the light of this discussion, the meaning of the Supreme Court becomes clear when it states, on page 13: "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded *as violative of any rights guaranteed* to petitioners *by the Fourteenth Amendment*. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that *there has been no action by the State* and *the provisions of the Amendment have not been violated.*" (Emphasis added.)

Bearing in mind the subsequent declaration of the Supreme Court in the *Shelley* case that judicial enforcement of the discriminatory covenant is state action and as such does violate the Fourteenth Amendment, under the theory of jurisprudence that a judicially enforceable remedy must exist in order for there to be a legally recognized right, the practical recognition by the Supreme Court of the fact that so long as the parties voluntarily adhere to their race restriction agreement, no constitutional question arises, can give plaintiffs little comfort and no support for the mainte- [fol. 22] nance of this action. For in referring to a "voluntary adherence" to such an agreement, it is apparent that the Supreme Court excludes from that term court action between the parties thereto. It necessarily follows that if the parties "voluntarily adhered" to their agreement, not only would there be no constitutional question presented for decision but also there would be no legal question at all before the court, for their would be no breach.

In *Hurd v. Hodge*, 334 U. S. 24, rendered the same day as *Shelley v. Kraemer*, supra, the Supreme Court did not have the necessity for state action in aid of private discrimination before it for consideration, since that case

arose in the District of Columbia. But in that case, the Supreme Court held the federal courts, like the state courts, could not enforce such discriminatory private agreement solely on the ground that so to enforce such covenants would be contrary to the public policy of the United States.

Under the decision of *Shelley v. Kraemer* and *Hurd v. Hodge*, therefore, a prodigious feat of legal legerdemain is required to transfer the passing observation of the Supreme Court to the effect that, so long as the parties voluntarily adhered to their agreement, no question would arise under the Fourteenth Amendment into a holding that such a discriminatory agreement is valid. Such a contention as that advanced by plaintiffs was, as a matter of record, rejected in the recent case of *Claremont Imp. Club v. Buck-*
[fol. 23] *ingham*, 89 Cal. App. 2d 32 (1948). In this case, the District Court of Appeal was asked to rule that plaintiffs were entitled to a judgment for declaratory relief declaring the covenants to be valid on the basis of the previously referred to distinction between the "voluntary adherence to their terms" as contrasted to their unenforcibility "by judicial process." The Court, however, summarily disposed of this request as follows: "Any ruling here under the process of declaratory relief would be no less confusing. . . . If it (the covenant) is unenforcible the whole purpose of the litigation fails." (89 Cal. App. 2d 32, 33.)

Since no action may be brought in either the state or federal courts to enforce the restrictive covenant, no legally cognizable right exists under the covenant which will give rise to an action for damages for its breach.

Plaintiffs' repeated reference to the fact that the action is confined to white defendants does not aid their case. The undiluted fact remains that a covenant such as that involved in the present case is discriminatory on the basis of color and race. As stated by the Supreme Court in *Shelley v. Kraemer*, 334 U. S. at p. 13, "Here *the particular patterns of discrimination* and the areas in which the restrictions are to operate, *are determined*, in the first instance, *by the terms of agreements among private individuals*. Participation of the State consists in the enforce-
[fol. 24] ment of the restrictions so defined." (Emphasis added.) The Court in the *Shelley* case also observed that its prior decisions in *Buchanan v. Warley*, 245 U. S. 60, and

Harmon v. Tyler, 273 U. S. 668, "involved the *rights of white sellers to dispose of their properties* free from restrictions as to potential purchasers based on considerations of race or color." (334 U. S. 1, at p. 12, emphasis added.) It is quite obvious to me that the chief concern of the Supreme Court is that the courts of this country refrain from becoming parties to and agencies of racial discrimination, regardless of whether the action be against whites or non-Caucasians.

Nor can there be any waiver on the part of the white vendors of their right to question the constitutionality of the discriminatory agreements by reason of their having consented to such an agreement in becoming parties to it. Racial discrimination is too portentous a constitutional evil to be enforced by legal action despite the fact that parties voluntarily may agree so to discriminate. For the rights of the classes of people against whom the discrimination is directed are too important to permit recognition by government through its judiciary of a right in the discriminatory agreements which will have the effect of perpetuating them. It would be begging reality to ignore the potential implicit in a judicial recognition of validity of such a restrictive covenant by awarding damages for [fols. 25-28] its breach—a potential of effectuating racial discrimination either by threats of similar coercive action against all who sold to non-Caucasians or by increasing the cost of property to the non-Caucasian based solely on racial factors.

Plaintiffs suggest a hypothetical case in which "John Doe purchased a home, and his neighbor came to him and offered him $1,500.00 if he would promise not to permit his home to be occupied by non-Caucasians. Suppose John Doe accepted the $1,500.00 cash and gave his written promise to his neighbor? Could he then, after a week or so, permit a Negro to move into his house without being liable for damages actually suffered by his neighbor from the said breach?"

The answer to plaintiff's question seems to me obvious and perfectly consistent with the views which I have heretofore expressed. While the promisee could not bring an action to enforce the contract by suing for its breach, he would bring an action for the return of the $1,500.00 on

the ground that the promise was unenforcible. If the court awarded him the return of the consideration, it would not be enforcing the race restriction agreement but rather it would be recognizing its unenforcibility.

The demurrer is sustained without leave to amend.

Dated: March 26, 1951.

Daniel N. Stevens, Judge.

[File endorsement omitted.]

[fols. 29-243] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 574475

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, DOE I, DOE II and DOE III, Defendants

JUDGMENT FOR DEFENDANT LEOLA JACKSON AFTER ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—March 29, 1951

In this action, the defendant Leola Jackson, by her attorneys, Sims & Wallbert, by Maurice H. Wallbert, Esquire, having appeared and demurred to the plaintiffs' Second Amended Complaint herein, and the issue of law thereto arising having been duly argued and submitted to the Court for decision, and the Court being fully advised in the premises did heretofore; to wit, on the 26th day of March, 1951, sustain said Demurrer to plaintiff's Second Amended Complaint herein without leave to amend:

Now therefore, it is hereby ordered, adjudged and decreed that plaintiff take nothing by this action as against defendant Leola Jackson, and that plaintiffs' Second Amended Complaint herein be dismissed as to defendant Leola Jackson; and that said defendant Leola Jackson have and recover her costs herein in the amount of $6.00.

Dated this 29th day of March, 1951.

Daniel N. Stevens Judge of the Superior Court.

[fol. 244] IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, Defendant and Respondent

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Appellants.

PETITION FOR REHEARING—Filed August 19, 1952

To the Honorable Presiding Justices and the Associate Justices of the District Court of Appeal

Plaintiffs and appellants Olive B. Barrows, *et al.*, respectfully petition for a rehearing after decision by the District Court of Appeal, Second Appellate District, Division Three, and in support of said petition show:

I

The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that the right to make and enforce contracts is one of the civil rights guaranteed by the equal protection clause of the United States Constitution.

[fol. 245] This legal issue was raised in appellants' reply brief on page 35, line 5 *et seq.*

II

The opinion of the District Court of Appeal does not consider the effect of the constitutional guarantee against state law impairing the obligation of contract.

This legal issue was raised in appellants' opening brief at pages 71 *et seq.*

III

The opinion of the District Court of Appeal does not consider the effect upon private contracts of applying the same equal protection test to classifications contained in contracts as is applied to classifications contained in legislation.

This legal issue was raised in appellants' opening brief on page 32, line 30 *et seq.*, and page 17, line 21.

IV

The Opinion of the District Court of Appeal does not consider the effect of the constitutional principle that a defendant or respondent may invoke the equal protection clause of the Constitution only if the facts show that the state action denies him, not another, of equal protection of the laws.

This legal issue was raised in appellants' opening brief on page 16, line 31 *et seq.* and page 28, line 12 *et seq.* and in appellants' reply brief beginning on page 12, line 17.

V

The opinion of the District Court of Appeal does not consider the effect of the fact that the petitioners in the restrictive covenant cases (334 U.S. 1; 92 L. Ed. 1161) were not parties to the covenant relied upon therein. [fols. 246-249] This legal issue was raised in appellants' opening brief on page 9, lines 11-13; page 15, lines 14 *et seq.*, and page 35 lines 4 *et seq.*

VI

The opinion of the District Court of Appeal does not consider the effect of the contention that the "common law rule" held unconstitutional by the *Shelly* case (334 U. S. 1; 92 L. Ed. 1161) was a particular manifestation of the power of the state to create and enforce interests in real property.

This legal issue was raised in appellants' opening brief on page 35, lines 4 *et seq.*, and in appellants' reply brief.

We respectfully submit that the petition for rehearing should be granted and that the judgment appealed from should be reversed and that defendant and respondent should be required to answer the complaint herein.

Respectfully submitted, John C. Miles, Attorney for Appellant M. M. O'Gara; John C. Miles and J. Wallace McKnight, By J. Wallace McKnight, Attorneys for Appellants Olive B. Barrows and Richard Pikaar.

[fol. 250] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, Defendant and Respondent,

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Appellants

PETITION FOR HEARING AFTER DECISION BY THE DISTRICT COURT OF APPEAL DENYING A REHEARING

To the Honorable Chief Justice of the Supreme Court of the State of California:

The appellants and each of them respectfully petition the Supreme Court of the State of California for a hearing of the within cause after decision by the District Court of Appeal of the State of California, Second Appellate District, Division III, affirming the judgment of the Superior Court sustaining respondent's demurrer to appellant's second amended complaint.

A petition for rehearing was filed by appellants (your petitioners) with said District Court of Appeal on August 20, 1952, and said petition for rehearing was denied on September 4, 1952.

[fol. 251] *Grounds for Hearing in the Supreme Court*

1. A hearing is necessary for the settlement of important questions of law on the matter of enforcement in damages of a racial restrictive agreement against a defendant and respondent who signed said agreement and received the consideration therefor.

2. A hearing is necessary for the settlement of important questions of law on the matter of appellants' constitutionally guaranteed right to make and enforce contracts and the denial to appellants of the equal protection of the law.

3. A hearing is necessary for the settlement of important questions of law on the matter of action by the state.

court taking the property of appellants without due process of law.

4. It is necessary that a hearing be granted in order to secure uniformity of decision in the State of California respecting the following:

(a) The opinion of the District Court of Appeal ignores the rule laid down in *Perez* v. *Sharp*, 32 Cal. 2d 711, that the constitutionality of state action must be tested on the basis of whether the defendant is affected because of his race.

(b) The opinion of the District Court of Appeal ignores the rule of enforcibility as stated in the case of *San Bernardino County* v. *Way*, 18 Cal. 2d 641, 117 P. 2d 354. [fol. 252] 5. There were substantial legal issues raised in the briefs which were not considered in the opinion; and the failure of the District Court of Appeal to consider said substantial legal issues was set forth in a petition for rehearing, namely:

a. "The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that the right to make and enforce contracts is one of the civil rights guaranteed by the equal protection clause of the United States Constitution.

b. "The opinion of the District Court of Appeal does not consider the effect of the constitutional guarantee against state law impairing the obligation of contract.

c. "The opinion of the District Court of Appeal does not consider the effect upon private contracts of applying the same equal protection test to classifications contained in contracts as is applied to classifications contained in legislation.

d. "The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that a defendant or respondent may invoke the equal protection clause of the Constitution only if the facts show that the state action denies him, not another, equal protection of the laws.

e. "The opinion of the District Court of Appeal does not consider the effect of the fact that the petitioners in the Restrictive Covenant Cases (334 U. S.

1, 92 L. Ed. 1161) were not parties to the covenant relied upon therein.

[fol. 253] f. "The opinion of the District Court of Appeal does not consider the effect of the contention that the 'common law rule' held unconstitutional by the Shelly case (334 U. S. 1, 92 L. Ed. 1161) was a particular manifestation of the power of the state to create and enforce interests in real property."

Report of the Decision of the District Court of Appeal

The opinion of the District Court of Appeal is reported in 112 A. C. A. 613. A copy of the opinion, showing the date of its filing on August 6, 1952, is attached hereto as Appendix "A."

Brief Statement of Facts

On or about the 21st day of October, 1944, appellants Barrows [Clk. Tr. p. 1, lines 21-26] and O'Gara [Clk. Tr. p. 2, lines 12-15], the ancestor in title of appellant Pikaar [Clk. Tr. p. 3, lines 12-14], and respondent Leola Jackson [Clk. Tr. p. 2, line 19] each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [Clk. Tr. p. 3, lines 5-19]. By the terms of said agreement, each of the signers promised and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or [fol. 254] persons not wholly of the White or Caucasian race [Clk. Tr. p. 3, lines 21-24]. By the terms of said agreement, each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [Clk. Tr. p. 4, lines 1-4]. On or about the 2nd day of February, 1950, respondent Leola Jackson and one Dorothy May Grace executed a grant deed to Pearnell Smalley and Florine Smalley [Clk. Tr. p. 6, lines 15-20]. Respondent Leola Jackson failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by

persons not wholly of the White or Caucasian race, which failure constitutes the first breach of respondents' contract complained of by appellants [Clk. Tr. p. 6, lines 21-26]. On or about the 4th day of September, 1950, persons not of the White or Caucasian race moved into and began to use and occupy the property as to which respondent Leola Jackson had contracted that it would never at any time be used or occupied by persons not of the White or Caucasian race [Clk. Tr. p. 5, lines 18-21]. Said use and occupancy on or about and after the 4th day of September, 1950, constitute the second breach of respondents' contract complained of by appellants. As a result of the breaches of contract, and each of them, appellants have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [Clk. Tr. p. 7, lines 2-8; p. 8, lines 15-20; p. 9, lines 3-8].

[fol. 255] Argument

I

May State Courts Constitutionally Enforce a Racial Restrictive Agreement in Damages Against This Defendant and Respondent Who Signed the Contract and Received the Benefit Contemplated as Consideration?

This is the important question of law to be settled by this appeal. This is the clear and well defined question presented by the opinion of the District Court of Appeal.

It is indisputable that prior to the decision of the United States Supreme Court in the Restrictive Covenant Cases, *supra*, this Court would have permitted recovery by the plaintiff in a case such as this. The only obstacle to the enforcement in damages of the contract in the case at bar is the construction placed upon the decisions in the restrictive covenant cases by the District Court of Appeal.

All other objections which have been raised are contrary to the settled law of this state as articulated in numerous decisions of this court and the District Courts of Appeal. All other objections serve only to confuse and cloud the issue.

The District Court of Appeal most admirably cleared away the clouds and confusion from the question to be

decided and rendered a decision on that question. Your petitioners respectfully submit that the learned court below erred in its decision but did so without confusing the issue.

It is respectfully submitted that this important question of law should be answered in favor of your petitioners, the plaintiffs and appellants herein, for the reasons contained in their opening and closing briefs and reemphasized below in this petition.

[fol. 256]

II

Petitioners' Right to Make and Enforce the Contract Sued Upon Herein Is a Civil Right Guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Petitioners Have Been Denied the Equal Protection of the Law by the Judgment of the Superior Court, as Sustained by the District Court of Appeal

The Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835, have been reaffirmed and followed by the United States Supreme Court in the restrictive covenant cases. The decision in the civil rights cases fully supports your petitioners' position by the use of the following language on page 22:

> "Congress, as we have seen, by the Civil Rights Bill of 1866 . . . undertook to wipe out . . .; and to secure to all *citizens* of *every* race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely: The same right *to make and enforce contracts*, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey, as is enjoyed by white citizens." (Emphasis added.)

[fol. 257]

III

Petitioners' Right to Enforce the Contract Sued Upon Herein Is a Property Right; and by the Judgment of the Superior Court, as Affirmed by the District Court of Appeal, the State Has Withheld From Your Petitioners Due Process of Law and Has Taken Your Petitioners' Property Without Due Process of Law in Violation of the Fourteenth Amendment of the Constitution of the United

States and in Violation of the Constitution of the State of California

It is respectfully submitted that this proposition is abundantly supported by the following authorities cited more fully in appellants' opening brief at page 68:

Morange v. United States (1937), 16 Fed. Supp. 1008;
Boeing Air Transport v. Farley (1935), 75 F. 2d 765, 767;
Lynch v. United States (1934), 292 U. S. 571, 78 L. Ed. 1434;
Worthen Co. v. Thomas, 292 U. S. 426;
People v. Eddy, 43 Cal. 331;
Werner v. So. Cal. Associated Newspapers (1940), 206 P. 2d 952.

[fol. 258]

IV

The District Court of Appeal by Its Decision in the Case at Bar Has Failed to Apply Two Principles of Law Enunciated by This Court

In the case of *Perez v. Sharp* (*supra*) the court said:

> "The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or to any other race, but to the rights of the individuals."

That opinion of this court seems clearly to have required the District Court of Appeal to test the state action sought in the case at bar by whether or not *respondent* would be affected because of her race. Clearly, a judgment for damages against respondent would not affect her because of her race but instead because of her contract.

In the case of *San Bernardino County v. Way* (*supra*), the court said:

> "Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are therefore inseparable . . ."

The language of the opinions in the restrictive covenant cases makes it very clear that such contracts as the one

involved here are valid. Enforcibility in the case at bar against this respondent follows under the rule stated in the above case.

[fol. 259]

V.

Substantial Legal Issues Were Raised in the Briefs But Were Not Considered in the Opinion of the District Court of Appeal and Were Set Forth in the Petition for Rehearing

A. The Superior Court and the District Court of Appeal, by determining that the contract sued upon cannot be enforced, have impaired the obligation of said contract in violation of Article I, Section 10, of the Constitution of the United States.

Argument A-10 of the appellants' opening brief is hereby incorporated by reference;

B. The reasonable classification test applied to legislative and other action taken by the state without the consent of the individual before the court resisting said action cannot be applied to action taken by the state with consent pursuant to an express contract against the personally consenting party to that contract.

The arguments presented in appellants' opening brief at page 17, line 21 and on page 32, lines 30, *et seq.*, are hereby incorporated by reference.

C. Whether your petitioners, plaintiff and appellants herein, are barred by the Constitution from recovering a judgment for damages against defendant and respondent must be determined solely by whether said defendant and respondent, and not another or others, would be deprived of her constitutional rights.

Tileston v. Ullman, 318 U. S. 44;
Liberty Whse. Co. v. Burley T. G. Coop. M. Assoc., 276 U. S. 71 at 88;
[fol. 260] *Columbia & G. R. Co. v. Miller*, 283 U. S. at 99-100;
Ashwander v. T. V. A., 297 U. S. 288, 347, 348.

It is evident from an analysis of the opinion of the District Court of Appeal that the opinion is based solely upon

a consideration of the indirect and speculative effect of a judgment for appellants upon a class not a party to this action.

The individual non-Caucasian who used and occupied the property as to which respondent contracted could not be affected in any way at all, directly or indirectly, by a judgment for the appellants.

The supposed indirect effect of a judgment for appellants upon persons unknown not of the white or Caucasian race (even if this were a permissible consideration) is purely speculative and, if real, is, for a number of reasons, of too slight practical importance to justify a decision revolutionizing the application of the Constitution to the right to make and enforce contracts. Perhaps chief among these many reasons is the fact that since the 15th day of February, 1950, every applicant for an F. H. A. loan has been required to covenant that he will not execute, etc. any instrument imposing a racial restriction upon the sale or use of the property mortgaged. In addition to that, every mortgagee is required by the Federal Housing Administration to establish that no racial restriction upon the property has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance.

[fol. 261] The amendments to the rules of the Federal Housing Commission establishing the above requirements were issued on the 12th day of December, 1949, at Washington, D. C., over the signature of Franklin D. Richards, Federal Housing Commissioner. A copy of these amendments are attached hereto as Appendix "B."

In view of the wide spread use made of F. H. A. insured financing on both new construction, renovation, remodeling and resale, and in view of the intensive private building activity in California, as in other parts of the nation, and in view of the many public housing projects, it must be clear that the ratio of restricted housing to unrestricted housing is not a cause for concern. Any possible indirect effect of a judgment for appellants would be of very slight practical importance. A judgment for appellants would not prevent equal facilities being available to all races. When a non-Caucasian is protected in the use and ownership of his own

it, as an absolute, the freedom of association. (Citing authorities.) This principle had been recognized in such matters as the freedom of association in labor relations, trade associations, and social and other clubs. It seemed untenable to argue that an association of land owners by means of common covenants was contrary to the long accepted principle of freedom of association. Only when such an association became [fol. 263] unreasonable and unduly oppressive of the public generally should it be restricted or avoided either by the courts or by the legislature. His Lordship could find nothing in the scheme of covenants in this case which could be said to be unduly oppressive of the public."

We quote from page 489 of the Ontario Weekly Notes, 1949:

"The present case, in his Lordship's opinion (Hogg J. A.), could not be brought within any of the classes to which the principle of public policy, as recognized by law, was applicable. It was urged that the doctrine of public policy should be extended because of the principles expressed and adopted in the various international charters and documents mentioned in Re Drummond Wren, *supra*, and because of the opinions expressed in judgments of the Supreme Court of the United States. In this respect his Lordship agreed with Schroeder J., and he could not conclude that the covenant now under consideration could be held void upon the grounds of public policy." (Interpretation added.)

Re Noble and Wolf, supra, was appealed to the Supreme Court of Canada and is reported in Canada Law Reports as *Noble, et al. v. Alley* (1951), S. C. R. 64. The opinion of the Court of Appeal of Ontario on the question of public policy was not disturbed by the opinion of the Supreme Court of Canada and therefore stands as the law of the Dominion of Canada. However, the Supreme Court of Canada held that the covenant sued upon was void as a restraint on alienation (covenant against sale) and unenforcible for uncertainty and did not touch and concern the

land and therefore did not run with the land and for these reasons the lower courts were reversed.

[fol. 264] It is, of course, clear that none of the questions involved in either of the Ontario cases is of any importance in California *because the previous decisions of the appellate courts of this state have settled all of these questions* except the last one mentioned above in appellants' favor by approximately one dozen cases directly in point. (See citations App. Op. Br. p. 8 for ten such cases.) Surely, such a uniform line of authorities is sufficient to settle the law of this state. As to the questions of the covenant running with the land, that is not involved here because respondent is the original contracting party.

It is equally clear that the speculative and uncertain indirect effect of a judgment for appellants upon a class not a party to this action is not a proper consideration. This case should be decided solely upon the rights of appellants and respondents.

D. The decisions in the restrictive covenant cases are not in point and cannot properly be relied upon in deciding the case at bar.

The restrictive covenant cases are distinguishable from the case at bar upon the most material facts. The only material fact common to those cases and the case at bar is that in all there are restrictive covenants which are valid. In the restrictive covenant cases the state courts attempted to enforce the contracts against persons who were never parties to those contracts. Here the defendant signed the contract and received the benefit therefor. Other distinctions are also apparent.

The opinion of the District Court of Appeal failed to notice in stating the facts of *Phillips* v. *Naff*, 332 Mich. 389, 52 N. W. 2d. 158, that the defendant in that case also had never executed the contract sued upon.

[fol. 265] E. The common law rule referred to in the opinions in the restrictive covenant cases was the rule of real property which bound the petitioners therein to a contract to which they were not parties.

The opinions in the restrictive covenant cases are ambiguous as to which common law rule of the state when applied by the state courts caused the state action to deny

the petitioners equal protection of the law. The ambiguity is removed by a study of the opinions in connection with the briefs submitted to the United States Supreme Court in those cases. It then appears with clarity that the court referred to the rule of real property which bound petitioners to a contract to which they had not been parties.

Conclusion

For the reasons set forth herein petitioners respectfully request that this court grant a hearing, and that as a result thereof the judgment appealed from be reversed and that defendant and respondent be required to answer the second amended complaint herein.

Respectfully submitted, John C. Miles, Attorney for Appellant, M. M. O'Gara. John C. Miles and J. Wallace McKnight, by J. Wallace McKnight, Attorneys for Appellants, Olive B. Barrows and Richard Pikaar.

[fol. 266]

Appendix "A"

Opinion of the District Court of Appeal

[Civ. No. 18717. Second Dist., Div. Three. Aug. 6, 1952.]

Olive B. Barrows, et al., Appellants,

v.

Leola Jackson, Respondent

Appeal from a judgment of the Superior Court of Los Angeles County. Daniel N. Stevens, Judge. Affirmed.

Action for damages for breach of covenant prohibiting use or occupancy of real property by non-Caucasians. Judgment of dismissal on sustaining demurrer to complaint without leave to amend affirmed.

John C. Miles and J. Wallace McKnight for Appellants.

John W. Preston as *Amicus Curiae* on behalf of Appellants.

Sims & Wallbert and Loren Miller for Respondent.

Rosalind Goodrich Bates, George E. Bodle, James Landye, Basil Feinberg, Saburo Kido, Fred Okrand, Everette Porter, A. L. Wirin, Abraham Gorenfeld, and David Sfskind, as *Amici Curiae* on behalf of Respondent.

VALLÉE, J.

This appeal presents the question whether the equal protection clause of the Fourteenth Amendment of the Constitution of the United States forbids the maintenance in a state court of an action for damages for the alleged breach of a covenant prohibiting the use or occupancy of real property by non-Caucasians. Defendant's demurrer to the complaint was sustained without leave to amend. Plaintiffs appeal from the judgment which followed.

[fol. 267] The facts alleged are these.

On October 21, 1944, three of the plaintiffs, the predecessor of the fourth, and the defendant, the owners of four parcels of realty in Los Angeles, entered into a written agreement by which each bound himself and his successors by a continuing covenant that no part of his realty "be used or occupied by any person or persons not wholly of the white or Caucasian race."

The agreement provided that the restriction should be incorporated in "all papers and transfers" of the lots that the restriction "be a covenant running with the land," that it was for the benefit of all the lots; and that if any of the lots should be used or occupied by any person not wholly of the white or Caucasian race, then in that event the covenantor who covenanted as to that lot, and his successors, would immediately become liable to those covenantors and their successors whose lots were not so occupied for all damages which they may have suffered by reason of the breach. The agreement was recorded May 8, 1945.

On February 2, 1950, defendant and one Grace executed a grant deed, which was recorded, by which they conveyed one of the restricted lots to the Smallys. Defendant did not incorporate the restrictions in the deed nor make any reference therein to the agreement.

On September 3, 1950, defendant moved out of the house on the lot conveyed, and on September 4, 1950, persons not of the Caucasian race moved in and began to use and occupy

the same. When defendant moved out of the house "she did so in order to permit persons known to her to be other than the Caucasian race to move into and occupy said house, [fol. 268] and with the intention that persons not of the Caucasian race should move into and occupy said house." Defendant, in violation of said agreement, has permitted persons not wholly of the white or Caucasian race to occupy the property, and such occupancy is for residence. Damage, claimed depreciation in the value of plaintiffs' properties, is alleged.

Plaintiffs assert they are entitled to recover damages for breach of contract in two respects: (1) for failure of defendant to incorporate the restrictive agreement in her conveyance to the Smallys, and (2) as an original covenantor. Defendant counters (1) a cause of action is not stated for failure to incorporate the restrictive agreement in the conveyance because the Smallys took title with constructive notice of its terms; (2) a cause of action is not stated for permitting the use and occupancy of the realty by non-Caucasians because a covenantor is not liable for the subsequent breach of the covenant by a subsequent owner; and (3) a cause of action is not stated because of applicable provisions of the state and federal Constitutions. Plaintiffs reply (1) a cause of action for failure to incorporate the restrictive agreement in the conveyance is stated because in any event they would be entitled to nominal damages under Civil Code, section 1466; (2) a cause of action is stated because defendant made a valid agreement that something would not be done: when use and occupancy by a non-Caucasian occurred that which defendant agreed would not be done was done, for which defendant is liable in damages; and (3) enforcement of the agreement is not prohibited by any provision of the state or federal Constitution.

[fol. 269] We first consider whether a cause of action is stated for damages for breach of contract, under common law principles.

There is privity of contract between three of the plaintiffs and the defendant. Each was an original party to the covenant and contractually assumed its obligations. Each contracted concerning the use and occupancy of his

land. Each bound himself that should his lot be used or occupied by non-Caucasians he would become liable to the others for whatever damage they may have suffered. As between themselves, in the absence of fraud or mistake, they are conclusively bound by their covenants if they are not contrary to public policy or violative of constitutional limitations.[1] When the lot as to which defendant covenanted was used and occupied by non-Caucasians liability occrued

An action for breach of a covenant is an action on a contract. The ordinary remedy for the nonfulfillment of a covenant is that the delinquent party must respond in damages.[2] The fact that other remedies may be available [fol. 270] to plaintiffs does not preclude their resort to an action for damages.[3]

Goldberg v. Nicola, 319 Pa. 183 [178 A. 809, 98 A. L. R. 774], relied on by defendant, is not analogous. There it was held that a covenantor of a benefit attached to land is not liable, after parting with his title, for a breach occasioned by possessors of the land subject to the covenant. The holding stemmed from the fact that there was no personal responsibility apart from privity of estate.

It is not essential that we determine whether the covenant is in fact one running with the land, as de endant

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[1] Los Angeles Terminal Land Co. v. Muir, 136 Cal 36, 42 [68 P. 308].

[2] Joyce v. Krupp, 83 Cal. App. 391, 397-398 [257 P. 124]; Borden v. Boyvin, 55 Cal. App. 2d 432, 436 [130 P. 2d 718]. See, also, Pedro v. County of Humboldt, 217 Cal. 493 [19 P. 2d 776]; Knight v. Black, 19 Cal. App. 518, 522 [106 P. 512]; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 402 [152 P. 935]; Pratt-Low Preserving Co. v. Evans, 55 Cal. App. 724, 731-732 [204 P. 241]; Eason v. Buffaloe, 198 N. C. 520 [152 S. E. 496]; Wyatt v. Adair, 215 Ala. 363 [110 So. 801]; 21 C. J. S. 982, §114; 14 Am. Jur. 663, §336; Clark, Covenants and Interests Running with Land, 2d ed., 172.

[3] Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract as such to be enforceable by the courts. (Cummings v. Hoke, 31 Cal. 2d 844-845 [193 P. 2d 742].)

argues, although the complaint alleges that the agreement provided that it was, and the fact is admitted by the demurrer.[4] If the covenant runs with the land, defendant, as an original covenantor, is not absolved thereby from the obligation of the covenant.[5]

We hold that apart from the constitutional issue the complaint states a cause of action for damages.

Since we so conclude, it is not necessary to decide whether a cause of action is stated for the failure of defendant to [fol. 271] incorporate the restrictive agreement in her conveyance to the Smallys.[6] We pass to consideration of the issue of constitutional power.

The parties agree, as they must, that the covenant, as such, is constitutionally a valid agreement;[7] that the conveyance by defendants to the Smallys was valid;[8] and that title passed.

In 1948 the Supreme Court of the United States decided Shelley v. Kraemer and McGhee v. Sipes, 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441], and Hurd v. Hodge and Urciolo v. Hodge, 334 U. S. 24 [68 S.

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[4] See Civil Code, sections 1461, 1468; Weller 1. Brown, 160 Cal. 515, 518-519 [117 P. 517]; Berryman v. Hotel Savoy Co., 160 Cal. 559 [117 P. 677, 37 L. R. A. N. S. 5]; Moe v. Gier, 116 Cal. App. 403 [2 P. 2d 852]; 7 Cal. Jur. 724, sec. 13.

[5] Pratt-Low Preserving Co. v. Evans, 55 Cal. App. 724, 728-729 [204 P. 241]; see Reno, "Equitable Servitudes in Land," 28 Va. L. Rev. 951, 962; Burby, "Land Burdens in California," 4 So. Cal. L. Rev. 343, 354; Ming, "The Restrictive Covenant Cases," 16 Univ. Chicago L. Rev. 203, 209, footnote 21.

[6] See Wayt v. Patee, 205 Cal. 46, 49-53 [269 P. 660]; Robertson v. Nichols, 92 Cal. App. 2d 201, 206-207 [206 P. 2d 898]; Oliver v. Hewitt, 191 Va. 163 [60 S. E. 2d 1, 2, 23 A. L. R. 2d 516]; Stanley v. Greenfield, 207 Ga. 390 [61 S. E. 2d 818, 819, 21 A. L. R. 2d 1256]; Anno. 4 A. L. R. 2d 1364, 1371.

[7] Anno. 14 A. L. R. 2d 153.

[8] Civ. Code, §§711, 715; Los Angeles Inv. Co. v. Gary, 181 Cal. 680 [186 P. 596, 9 A. L. R. 115].

Ct. 847, 92 L. Ed. 1187], generally referred to as the Restrictive Covenant Cases. The admonition of these cases is that a state may not by judicial process enforce private rights derived from consensual agreements of private individuals where to do so would result in the infringement of civil liberties guaranteed by the Constitution of the United States.

Long prior to the Restrictive Covenant Cases, Judge Erskine M. Ross of the United States Circuit Court, the donor of the American Bar Association's Ross Essay prize, in Gandolfo v. Hartman (1892 C. C. S. D. Cal), 49 F. 181 [fol. 272] [16 L. R. A. 277], was the first judicial voice to hold enforcement of a racial restrictive covenant prohibiting the use of real property by persons of a specified race invalid on constitutional grounds.[9, 10] Other than Gandolfo v. Hartman, *supra*, judicial enforcement of covenants which have for their purpose the exclusion of persons of a specified, or anyone not of a designated, race from the use or occupancy of real property, was uniformly sustained over constitutional objections founded on the Fourteenth Amendment, including the equal protection clause and the due process clause.[11]

[9, 10] Referring to the equal protection clause of the Fourteenth Amendment, Judge Ross said (p. 182):

"It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear."

[11] Anno. 3. A. L. R. 2d 477.

The restriction in the Shelley case[12] was embodied in an agreement signed by thirty property owners of a St. Louis neighborhood. The agreement declared that no part of the property shall be occupied by any person not of the Caucasian race, and specifically restricted its use against occupancy by Negroes and persons of the Mongolian race [fol. 273] for 50 years. One of the parcels was conveyed to Shelley, a Negro. An owner of property covered by the restrictions brought suit. The relief sought and granted by the Missouri court was an injunction restraining Shelley from taking possession of the covenanted parcel and a decree divesting him of title and revesting the title in his immediate grantor. The restrictive agreement in McGhee v. Sipes provided that the property should not be used or occupied by any person or persons except those of the Caucasian race. Injunctive relief was granted by the Michigan court.

The Supreme Court of the United States in these cases held: (1) private agreements which have for their purpose the exclusion of persons of designated race or color from the use or occupancy of real property, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment;[13] (2) the actions of state courts and judicial officers are actions by the states within the meaning of the Fourteenth Amendment; (3) in granting judicial enforcement of such private agreements the courts of Missouri and Michigan acted to deny the excluded races the equal protection of the laws, contrary to the Fourteenth

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[12] 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

[13] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment: (4) denial of access to the courts to enforce [fol. 274] such restrictive covenants does not deny equal protection of the laws to the parties to such agreements.[14]

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[14] The Court in part said (334 U. S. 1, 4 *et seq.*):

"These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.

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"It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'

"This Court has given specific recognition to the same principle. (Buchanan v. Warley, 245 U. S. 60 [62 L. Ed. 149, 38 S. Ct. 16.]

"Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

"Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3 [3 S. Ct. 18, 27 L. Ed. 835] (1883), the principle has become firmly embedded in our constitutional [fol. 275] law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. *Cf.* Corrigan v. Buckley, *supra* [271 U. S. 323, 70 L. Ed. 969, 46 S. Ct. 521].

"But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment.

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"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see

fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

"The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular [fol. 276] pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives

sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear.

. . . . . .

"Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf.* Marsh *v.* Alabama, 326 U. S. 501 [66 S. Ct. 276, 90 L. Ed. 265] (1946).

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"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." (334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].)

D. O. McGovney, Professor of Law, University of California, in 1945, plotted the pattern for Shelley *v.* Kraemer in "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Cal. L. Rev. 5.

[fol. 277] Hurd *v.* Hodge and Urciolo *v.* Hodge [15] arose in the District of Columbia. The restrictive covenant provided that specified lots should never be rented, leased, sold, transferred or conveyed to any Negro or colored person under a penalty of $2,000, a lien against the property. The defendants were Negro purchasers of some of the restrictive properties and a white person who had conveyed some of the properties to them and who owned other restricted lots. The lower court declared null and void the deeds to the Negro purchasers, enjoined the defendant white property owner from leasing, selling, or conveying the properties to any Negro or colored person, and enjoined the Negro defendants from leasing or conveying the properties and directing them to remove from the properties.[16] Among other things the Supreme Court stated that it had held in [fol. 278] the Shelley case that the Fourteenth Amendment forbids discrimination whereby a colored man is deprived of

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[15] 334 U. S. 24 [68 S. Ct. 847, 92 L. Ed. 1187].

[16] "The problem of racial residence restrictions is not peculiar to Negroes, although constituting nearly a tenth of our citizenry they are the largest group affected. In the Pacific Coast states discriminatory restrictions usually proscribe all non-Caucasians, both citizens and aliens. In the Southwest it is common specifically to proscribe Mexicans and American citizens of Mexican descent, *e. g.*, 'persons commonly called Mexicans.' A residential subdivision adjacent to Fresno, California, is covered by restrictive agreements 'that neither said premises, nor any part thereof, shall be used in any manner whatever or occupied by any Negro, Chinese, Japanese, Hindu, Armenian, Asiatic, or native of the Turkish Empire, or descendant of above named persons; provided however, that such a person may be employed by a resident upon said property as a servant for such resident.' Armenians and nearly all natives of the Turkish Empire are whites, or members of the Caucasian race. From a constitutional standpoint there seems to be no distinction between state enforcement of prejudice against all Negroes or all Chinese and state enforcement of prejudice against some subdivision of the white race, such as all Armenians or all Jews." (33 Cal. L. Rev. 15.)

the right to acquire property free from interference imposed by state courts in the enforcement of restrictive covenants, and "that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States."[17]

The precise question in the case at bar is narrowed to this: Does the maintenance of an action at law for damages by an original covenantee against an original covenantor for breach of a restrictive covenant which has for its purpose the exclusion of non-Caucasians from the use and occupancy of real property, constitute such enforcement of the covenant as to violate the equal protection clause of the Fourteenth Amendment?

Since the decisions in the Restrictive Covenant Cases, the question in the present case has arisen in Weiss v. Leaon (1949), 359 Mo. 1054 [225 S. W. 2d 127], Roberts v. Curtis (1950, D. C. Dist. Col), 93 F. Supp. 604, Correll v. Earley [fol. 279] (1951, — Okla. — [237 P. 2d 1017], and Phillips v. Naff (1952), 332 Mich. 389 [52 N. W. 2d 158].[18]

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[17] James *v.* Marinship Corp., 25 Cal. 2d 721 [155 P. 2d 329, 160 A. L. R. 900], involved exclusion of Negroes by a union. The court, *inter alia*, said (pp. 739, 740):

"The discriminatory practices involved in this case are, moreover, contrary to the public policy of the United States and this state. The United States Constitution has long prohibited governmental action discriminating against persons because of race or color. (5th, 14th, and 15th Amendments.) . . . Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color." (Yoshida *v.* Gelbert Imp. Co. (1946), 58 Pa. D. & C. 321, 34 Del. Co. 443, and *Re* Wren, Ont. R. 778, 4 D. L. R. (1945) 674, held racial restrictive covenants void on the ground of public policy.

[18] In Clifton v. Puente (1948, Tex. Civ. App.), 218 S. W. 2d 272, the restrictive covenant prohibited the sale or lease of the property to "persons of Mexican descent." Puente, a citizen of Mexican descent, acquired title. A covenantee sued to cancel the deed. Puente cross-complained for a de-

Weiss v. Leaon [19] was an action to enforce a racial restrictive covenant by injunction or, in the alternative, to recover damages for its breach. The covenant, created by private agreement, was that none of the lots in the restricted area be sold to or occupied by Negroes. The court held that the action was properly dismissed insofar as it sought injunctive relief but that the petition stated a claim for damages. The court read the Shelley case as merely holding that specific performance of a racial restrictive covenant by judicial decree is a violation of the Fourteenth Amendment, and that it does not proscribe [fol. 280] an action for damages for breach of such a covenant between parties under the agreement.[20]

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cree quieting title. In holding for Puente the court said, page 274: "Without affirmative enforcement of the racial covenant involved, it would seem that the scheme of restriction applicable to the subdivision of which the property here involved is a part can not be effectively realized, should voluntary methods fail. . . . It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated upon the position of a party (alleged to be an ineligible grantee) as a plaintiff or as a defendant. Under the decision of the Supreme Court, above referred to, judicial recognition or enforcement of the racial covenant involved here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment.'"

[19] 359 Mo. 1054 [225 S. W. 2d 127].

[20] Referring to the Restrictive Covenant Cases the court stated (p. 130):

"Thus the Supreme Court holds that specific performance of a racial restrictive agreement by judicial decree is a violation of the Fourteenth Amendment, although the agreement itself is constitutionally valid. The question whether the Fourteenth Amendment also forbids an action for damages for the breach of a restrictive agreement between parties under the agreement was not raised or discussed.

"Except for the constitutional issue advanced under

In Correll v. Earley[21] the restrictive covenant was contained in an agreement between lot owners in one block in Oklahoma City. They covenanted that no owner should sell, lease, or give away any property in the block to any person of the Negro or African race. There were two causes of action: one to cancel deeds by two owners to an insolvent dummy and from the dummy to Negroes, the other for damages—alleged diminution in the value of the [fol. 281] plaintiff's lots because the conveyances were the consummation of a conspiracy to wilfully violate the covenant. The lower court sustained a general demurrer to the petition. On appeal it was held that the Restrictive Covenant Cases controlled so far as it was sought to cancel the deeds but that a cause of action for damages

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Shelley v. Kraemer there is no question under the general law but that the remedy of damages for breach of the agreement would be available. . . .

"In the case at bar the restrictive covenant may not now be specifically enforced because Shelley v. Kraemer has held judicial enforcement violates the Fourteenth Amendment.

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"Since Shelley v. Kraemer also found the restrictive agreement itself, made by private parties, was valid as against the charge of unconstitutionality, it may follow that an action for its breach, rather than its enforcement, might lie. For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages unless it, too, is unconstitutional under the circumstances.

"Under the facts of this case, we hold that according to the law as we now understand it, the trial court may hear and determine an action for damages for the breach of the restriction agreement in question between plaintiffs and defendants Leaon without violating any provision of the Federal or State Constitutions. We are of the opinion that an action for damages for the breach of a valid agreement need not be affected by the Fourteenth Amendment." (359 Mo. 1054 [225 S. W. 2d 127].)

[21] Okla. [237 P. 2d 1017].

was stated. The court reasoned that the rule of the Restrictive Covenant Cases did not apply against the plaintiffs' right to collect damages if they had actually been damaged by the violation of a valid contract by the defendants as the consummation of a conspiracy to so violate it with the wilful intent to thereby damage the plaintiffs.[22]

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[22] The court referring to the Restrictive Covenant Cases, said (p. 1021 [237 P. 2d]):

"The rule of these Federal decisions would support the trial court in part, but only in part. Those decisions follow the rule that the State may not discriminate against a defendant on account of his race. It was there held that if the State, through the court, should forbid conveyance of property to a party because of his race, with the application or use of the power of the State to compel obedience to the decree which would naturally result, that would amount to a discrimination by the State in violation of the Federal Constitution.

"But this is no rule against plaintiffs' right to collect damages if plaintiffs have actually been damaged by the violation of a valid contract, violated by defendants as the consummation of a conspiracy to so violate it, with the wilful intent to thereby damage these plaintiffs.

"This is a valid contract between the white citizens who made it. That is true under the rule of the Federal decisions above cited. They expressly so say. In Shelley v. Kraemer, *supra*, it was contended that such a restrictive agreement was invalid but the Supreme Court of the United States denied that contention, holding that the contract was valid, although power was withheld from the State courts to enforce it as against Negro purchasers. . . .

"Those of the defendants who are white citizens and were bound by this valid contract conspired together to violate the contract for the intended purpose of doing damage to plaintiffs and their property. The Negro defendants knowingly joined with them in the conspiracy for the same intended purpose. We are compelled to take this as true

because it is specifically alleged by the plaintiffs and is admitted by the demurrers. . . .

"So we have this situation: the plaintiffs have a valid contract in protection of their home and property; the courts may not cancel the deed made to Negroes in violation of the contract because the application of the Federal rule deprives the courts of power to do so, or in other words, the court must decline to cancel the deed lest by so doing they conduct the State into an act of discrimination against its Negro citizen.

"But no such thought need deter the courts in the matter of mere compensatory damages, or punitive damages if wilful wrongdoing justifies such damages. That is to say, if the court requires a white owner of real estate to pay damages, which he intentionally and purposely caused, in direct violation of a valid written contract, of which he had knowledge and to which he was or became a party, that act or judgment by the court would not constitute any act of discrimination by the State against a Negro citizen. None of the defendants had any legal right to conspire to knowingly injure the value of the property of another citizen. . . .

"If the contract, despite its restrictive covenants, is valid, as held by the United States Supreme Court, and if the defendants conspire to violate it, with knowledge and intention that in so doing they will cause damage to the plaintiffs and they consummate the scheme and cause the intended damage, all of which is admitted by the demurrers, the defendants would be liable to plaintiffs for damages sustained.

"Under the Federal ruling in the cited cases defendant white owners could convey a legal title to the Negro purchasers and the Negro purchasers could legally purchase such properties. But since the restrictive contract was valid the white seller would act at his peril of being required to pay plaintiffs damages for breach of a valid contract between himself and other lot owners. Here it is charged that, in order to evade being required to pay damages for his breach, the original white owner, who might have been financially responsible, entered into a conspiracy to convey to one who was without financial responsibility,

[fol. 282] Roberts v. Curtis,[23] which arose in the District of Columbia, was an action for damages for breach of a [fol. 283] restrictive covenant not to sell to Negroes. In dismissing the action the court, referring to the Shelley and Hurd cases, said: "The Supreme Court further held that it was contrary to the Fourteenth and Fifteenth Amendments to the Constitution and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings. Although the actions involved in those cases were suits for injunctions, the ruling is broad enough to cover actions for damages as well. I construe the ruling of the Supreme Court as withholding any assistance by way of judicial action of any kind from the enforcement of such restrictive covenants."

Phillips v. Naff[24] was an action at law for damages for an alleged breach of a reciprocal racial restrictive covenant. The covenant, contained in a recorded agreement, restricted use and occupancy of the property to white persons of "pure Caucasian race," and provided it should run with the land. Defendant, a restricted lot owner, conveyed to Negroes and placed them in possession and occupancy. The plaintiffs were owners of other restricted lots. The trial court dismissed the action. Affirming, the

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the latter to convey to the Negro purchaser. Under the demurrer we must assume this to be true. Thus it was intended to cheat and deprive plaintiff of his right to pursue a solvent seller on his claim of damages for breach of contract. This is one vice of the conspiracy. If the conspiracy was vicious, all parties participating therein are liable for any injury sustained by plaintiffs as a result of the conspiracy. All acts done in carrying out the conspiracy were extraneous to the mere sale of property to Negro purchasers, and extraneous to the performance or nonperformance of the restrictive contract.

"This action alleging the conspiracy is grounded in tort." (Okla. [237 P. 2d 1017].)

[23] 93 F. Supp. 604.

[24] 332 Mich. 389 [52 N. W. 2d 158].

Supreme Court of Michigan, quoting at length from Shelley v. Kraemer,[25] said (p. 161):

"On behalf of appellants it is conceded that, in view of the decision in Shelley v. Kraemer, *supra*, they may not maintain an equitable suit for injunction relief. They insist, however, that an action for damages under the factual situation set forth in the declaration is not one [fol. 284] for the enforcement of the discrimination, and is not within the inhibition of the 14th amendment. We think that the statement in the language above quoted that state action is not involved so long as the purposes of agreements are effectuated by 'voluntary adherence' to their terms is significant. Plaintiffs' action for damages may not be regarded as involving individual conduct solely. The aid of the court is invoked on the theory that the agreement is valid as between the parties who signed it and their successors in title, and that the state acting through the courts will permit the recovery of damages for failure to observe it. In other words, plaintiffs assert the right to invoke state action within the meaning of the term as discussed in Shelley v. Kraemer, *supra*.

"We are in accord with the view of the trial judge that *liability to suits for damages for breach of a reciprocal racial restriction constitutes an indirect method of enforcement*. In the instant case it is obvious that if plaintiffs are entitled to recover damages the owners of other lots in the restricted area may do likewise. It is a reasonable assumption that the owner of a restricted lot having the opportunity and desiring to sell to a purchaser not of the Caucasian race would be reluctant to do so if plaintiff's position is correct. It may be noted, also, that since the restrictive covenant runs with the land, defendants' grantees, who are, it appears, now in possession, hold the property subject thereto. The question naturally suggests itself, under plaintiff's theory, as to the liability of the present owners for damages in the event that they convey the property to a grantee of their own race." (Italics added.)

[fol. 285] The Supreme Court of Michigan declined to

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[25] 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

follow the Missouri supreme Court, saying of Weiss v. Leaon:[26]

"The decision of the Missouri court sustaining the count for damages must be regarded as supporting plaintiffs' theory in the case at bar. However, we are not in accord with such decision. As above suggested, if a sale of property subject to a reciprocal racial covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed, and also to place a burden on the right of an owner to sell to a purchaser of his own selection. We think the reasons on which the decision of the United States Supreme Court in Shelley v. Kraemer, *supra*, were based operate in bar of an indirect method of enforcement, and are sufficiently broad in scope as to cover the rights of those affected in the instant controversy. The 14th amendment, as construed, prevents the maintenance of the action for damages instituted by plaintiffs."[27]

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[26] 359 Mo. 1054 [225 S. W. 2d 127].

[27] Since Shelley, the courts of this state have uniformly held that state court injunctive enforcement of a private racial restrictive covenant as to occupancy of land is state action which denies persons of the excluded race their right to equal protection of the laws, and therefore violates the Fourteenth Amendment. (Cumings v. Hokr, 31 Cal. 2d 844 [193 P. 2d 742]; *In re* Laws, 31 Cal. 2d 846 [193 P. 2d 744]; Cassell v. Hickerson, 31 Cal. 2d 869 [193 P. 2d 743]; Davis v. Carter, 31 Cal. 2d 870 [193 P. 2d 744]; Lippold v. Johnson, 32 Cal. 2d 892 [197 P. 2d 161]; Back v. Young, 32 Cal. 2d 892 [197 P. 2d 161]; Thompson v. Clarke, 32 Cal. 2d 892 [197 P. 2d 161]; Meriweather v. Fleming, 32 Cal. 2d 893 [197 P. 2d 161]; Mayer v. Robinson, 32 Cal. 2d 893 [197 P. 2d 161]; Pearce v. Croker, 32 Cal. 2d 893 [197 P. 2d 161]; Cavett v. Butler, 32 Cal. 2d 894 [197 P. 2d 161]; Clayton v. Wilkins, 32 Cal. 2d 895 [197 P. 2d 162]; Morin v. Crane, 32 Cal. 2d 896 [197 P. 2d 162]; Coleman v. Stewart, 33 Cal. 2d 703 [204 P. 2d 7]; Matthews v. Andrade, 87 Cal. App. 2d 906 [198 P. 2d 66]; Claremont Imp. Club v. Buckingham, 89 Cal. App. 2d 32 [200 P. 8d 47].) In Morin v. Crane,

[fol. 286] We are in accord with the Supreme Court of Michigan. We think the Supreme Courts of Missouri and Oklahoma misread the Restrictive Covenant Cases. The Missouri court in Weiss v. Leaon[28] confused "enforcement" with "specific enforcement." It interpreted the holding of Shelley in the narrowest possible light when it said the Supreme Court intended to foreclose only one means—specific performance—of judicial action in support of racial restrictive covenants, while leaving available an action for damages for breach of such covenants. The Oklahoma case, Correll v. Earley,[29] perhaps may be distinguished on the ground that it was a tort action for damages resulting from a wilful, malicious conspiracy. Language in the opinion cannot be reconciled with the Shelley case.

An analysis of the opinion in the Shelley case points to but one conclusion, *i. e.*, the Fourteenth Amendment forbids the maintenance of an action for damages for breach of a racial restrictive covenant. The question in that case did not relate to the nature of the relief sought but, as stated by the court, related to the "validity of court enforcement" of such covenants. The question was "whether the equal protection clause of the Fourteenth [fol. 287] Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color."[30]

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supra, the court said: "[W]e do not reach the question as to whether any tenable cause of action for relief or recovery other than specific enforcement of the racial restrictions is, or could be, stated."

[28] 359 Mo. 1054 [225 S. W. 2d 127].

[29] Okla. [237 P. 2d 1017].

[30] "One of the great purposes of the Fourteenth Amendment was to lift the Negro from his slavery to a plane of perfect equality of civil rights with all other persons and to remove from his enjoyment of them all obstructions based on race or color. Among the absolute civil rights to be protected from discriminatory action by the state are the rights to inherit, purchase, lease, sell, hold and convey real and personal property. Not only has the Civil Rights Act defined these basic rights so that there can be no doubt

In holding that it did, the court pointed out that restrictions on the right of occupancy, if imposed by state statute or local ordinance, could not be squared with the requirements of the Fourteenth Amendment; and if created by private agreement, they likewise could not be squared with the requirements of the Amendment where the purposes of the agreement are secured by judicial enforcement by state courts, since judicial enforcement is action of the state for the purposes of the Amendment. The court declared that the "Amendment erects no shield against merely private conduct, however discriminatory or wrongful," and said (p. 1180, 92 L. Ed.):

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear [fol. 288] *clear that there has been no action by the State and the provisions of the Amendment have not been violated.* [Citation.] [31]

"But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreement." (Italics added.)

The unmistakable implication from the italicized statement is that unless adherence is voluntary the purposes of the covenant cannot be effectuated.[32] One does not

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of them, but in its declaration that all citizens should enjoy them equally it has expressed a condition regarded as essential by the framers of the Fourteenth Amendment. It seems clear, therefore, that state action of any kind which prevents this equality by denying to citizens of the United States the equal protection of its laws is forbidden and nullified by this amendment." (24 N. Y. Univ. L. Q. Rev. 230-231; see *Ex parte* Virginia, 100 U. S. 339, 344 [25 L. Ed. 676].)

[31] The same statement was made in the Hurd case and in each instance was preceded by the word "we."

[32] Racial restrictive covenants are valid so long as their purposes are achieved by voluntary adherence of the

voluntarily refrain from doing an act when by doing the act one may be subjected to an action for damages and one's property be taken by execution. It was pointed out that the Civil Rights Cases[33] declared that the Fourteenth Amendment makes void "State action of every kind" which is inconsistent with the guarantees therein contained.

[fol. 289] The opinion in the Shelley case contains this very pertinent statement (p. 1184, 92 L. Ed.):

"Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

And (p. 1185, 92 L. Ed.):

"Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws

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parties irrespective of the unjust discrimination; for it is the right of every property owner to decline to permit the use and occupancy to any individual or class. Anno. 14 A. L. R. 2d 153.) The covenant is constitutionally valid but unenforceable. Valid but unenforceable agreements are not unknown to the law. They exist in cases affected by the statute of frauds (lack of writing), the statute of limitations (undue time), and in cases of unconscionable bargains.

[33] In the Civil Rights Cases, 109 U. S. 3, 11 [3 S. Ct. 18, 27 L. Ed. 835], Justice Bradley stated that the Amendment: ". . . nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."

to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

The court in the Shelley case did not go part of the way; it went all of the way. The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation. It erected a broad barrier to segregation by judicial decree. The holding that judicial enforcement of racial restrictive covenants is prohibited carries meaning only if that prohibition extends to enforcement, whether it is sought in equity or at law. Shelley holds not that enforcement of the covenant is against principles of equity, but that judicial enforcement of racial restrictive covenants denies equal protection of the laws. [fol. 290] We know of no precedent for the proposition that when specific performance of a contract is forbidden because such a decree is unconstitutional, an alternative remedy for damages may be granted: Each necessarily calls upon the courts for action; each is, therefore, equally state action and equally within the proscription of the Fourteenth Amendment.

The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of use or occupancy of the property by non-Caucasians—it is no longer a matter of individual action: it is one of state participation in the maintenance of racial residential segregation. Racial discrimination is inherent in the covenant; its purpose and impact is to prevent the use or occupancy of real property by non-Caucasians, to segregate non-Caucasians, "simply that and nothing more."[34] The basic pattern of racial discrimination is as much the same in an action for damages as it is in a suit in equity. The maintenance of an action for damages against an original covenantor would aid and encourage the discrimination, not by preventing a non-Caucasian from using or

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[34] Shelley v. Kraemer, 334 U. S. 1, 10 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

occupying the property, but by holding a covenantor liable in damages upon the happening of that contingency, a liability which would not be incurred if the property were used or occupied by a Caucasian.

The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitu- [fol. 291] tionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to buy a home and live in it. Distinction between direct and indirect state action is tenuous. The enforcement of a covenant by an action for damages furnishes a prepotent motive to prevent use or occupancy of property by non-Caucasians; that is, the indemnification of other property owners when a non-Caucasian uses or occupies the property. The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate. In addition to the likelihood of being subjected to a money judgment, the vexation and expense of a lawsuit enhances the coercion. There can be no doubt that the threat to a covenantor of liability in damages, with consequent execution and sale, for disregarding a racial restrictive covenant, would operate as a deterrent to the breaching of its terms; and, in the words of the Supreme Court of Michigan, "would operate to inhibit freedom of purchase by those against whom the discrimination is directed." When a court undertakes to buttress that threat by lending its power to give effect to the covenant, the court is facilitating the discriminatory purpose of the covenant and extending the "full panoply of state power" [35] to its practical effectiveness.[36]

[fol. 292] The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the convenantor directly rather than directly

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[35] Shelley v. Kraemer, 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

[36] See "Discrimination in Ownership and Occupancy of Property since Shelley v. Kraemer," U. C. L. A. Intramural Law Rev. June, 1952.

against the non-Caucasian, does not affect the result.[37] In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action.

The contention that an action for damages against an original covenantor is to be distinguished from a suit in equity because in the former the defendant, by his covenant, consents to suit whereas in the latter he does not consent, is ingenious but faulty. An individual cannot consent to state court action the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation and thus deny to a class of citizens the equal protection of the laws. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; it will not promote in one form that which it declares wrong in another. The argument loses sight of [fol. 293] the fact that Shelley holds that if such covenants of private individuals require recourse to the courts to make them effective, the Fourteenth Amendment precludes such aid.

The denial of access to the courts does not deprive plaintiffs of their property without due process of law. The Constitution itself deprives them of the use of the courts when their purpose is the enforcement of their discriminatory covenant. "The Constitution confers upon no individual the right to demand action by the State which results in the

[37] See Kemp v. Rubin, 298 N. Y. 590 [81 N. E. 2d 325]; Buchanan v. Warley, 245 U. S. 60 [38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C 210, Ann. Cas. 1918A 1201].

denial of equal protection of the laws to other individuals."[38]

In the light of the Restrictive Covenant Cases it is the duty of the courts of this state to refrain from exerting judicial power to give legal sanction and effect to racial restrictive covenants in an action at law for damages. The demurrer was properly sustained.

Affirmed.

Shinn, P. J., and Wood (Parker), concurred.

[fols. 293½-299] APPENDIX "B"

Amendment to Rules of the Federal Housing Commissioner for Mutual Mortgage Insurance Under Section 203 of the National Housing Act

Section III of the Administrative Rules under Section 203 of the National Housing Act, revised August 15, 1946, as amended, is hereby amended by adding at the end thereof the following new subsection:

> "15. The mortgage shall contain a covenant by the mortgagor that until the mortgage has been paid in full, or the contract of insurance otherwise terminated, he will not execute or file for record any instrument which imposes a restriction upon the sale or occupancy of the mortgaged property on the basis of race, color, or creed. Such covenant shall be binding upon the mortgagor and his assigns and shall provide that upon violation thereof the mortgagee may, at its option, declare the unpaid balance of the mortgage immediately due and payable."

Section IV of said Administrative Rules is hereby amended by adding at the end thereof the following new subsection:

> "5. A mortgagor must certify that until the mortgage has been paid in full, or the contract of insurance

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[38] Shelley v. Kraemer, 334 U. S. 1, 22 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

otherwise terminated, he will not file for record any restriction upon the sale or occupancy of the mortgaged property on the basis of race, color, or creed or execute any agreement, lease, or conveyance affecting the mortgaged property which imposes any such restriction upon its sale or occupancy."

Section V of said Administrative Rules is hereby amended y adding at the end thereof the following new subsection:

"5. A mortgagee must establish that no restriction upon the sale or occupancy of the mortgaged property, on the basis of race, color, or creed, has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance."

This amendment is effective as to all mortgages on which a commitment to insure is issued on or after February 15, 1950.

Issued at Washington, D. C., this 12th day of December, 1949.

Franklin D. Richards, Federal Housing Commissioner.

[fol. 300] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 301] Order Due Oct. 4, 1952.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

BARROWS et al.,

v.

JACKSON

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Appellants' petition for hearing Denied.

Shenk, J., Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Gibson, Chief Judge.

Filed Oct. 2, 1952. William I. Sullivan, Clerk, by ——, L. A. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 6th day of October, A. D. 1952.

William I. Sullivan, by Henry P. Crabtree, Deputy Clerk.

[fol. 302] IN THE SUPREME COURT OF THE UNITED STATES

No. —

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for writ of certiorari and, in the event the petition be granted, for the purpose of

hearing and determining the case on the merits, the printed record shall consist of the following:

Second Amended Complaint	Pages	1 thru 9
Demurrer		11 thru 12
Memorandum Opinion		14 thru 25
Judgment		29
Petition for Rehearing		244 thru 246
Petition for Hearing Including Appendix A (Opinion of District Court of Appeal)		247 thru 293
Order of California Supreme Court denying hearing after judgment by District Court of Appeal		301

It is further Stipulated and Agreed that any of the par-
[fol. 303] ties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

John C. Miles, J. Wallace McKnight and Charles Leland Bagley, by Charles Leland Bagley, Counsel for Petitioner. Sims & Wallbert & Loren Miller, by Maurice H. Wallbert, Counsel for Respondent.

[fol. 304] Supreme Court of the United States, October Term, 1952.

No. 517

Olive B. Barrows, Richard Pikaar and M. M. O'Gara, Petitioners,

vs.

Leola Jackson

Order Allowing Certiorari—Filed March 9, 1953

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1952

No. .....

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on August 6, 1952.

Opinions Below.

The Memorandum Opinion of the trial court [R. 8-16] is unreported. The opinion of the District Court of Appeal [R. 30-56] is reported in 112 A. C. A. 613; 247 P. 2d 99. Rehearing denied September 4, 1952. Hearing in the Supreme Court of the State of California denied October 2, 1952, by a vote of four to three [R. 58].

Jurisdiction.

The order of the Supreme Court of the State of California denying petitioners' petition for hearing was entered on October 2, 1932. (*American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.) Three of the seven justices were of the opinion that a hearing should be granted [R. 58]. The jurisdiction of this court is invoked under 28 U. S. C. A., Secs. 1257(3) and 2101(c).

The right of equal protection of the laws and the right to the due process of law claimed under the Fourteenth Amendment to the Constitution of the United States was specially set up by defendant and respondent in her demurrer to plaintiffs' second amended complaint [R. 8] in the following language:

> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.
>
> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States."

The above rights were urged by respondent in her reply brief in the District Court of Appeal.

The above federal questions were passed upon by the District Court of Appeal in respondent's favor in the following language:

> [R. 32.] "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 54.] "The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action."

The right, privilege or immunity of petitioners under the Fourteenth Amendment to the Constitution of the

United States against being deprived of property without due process of law was set up in the trial court,[1] in petitioners' opening brief in the District Court of Appeal,[2] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 19 and 23].

The above federal question was passed upon unfavorably to the petitioners by the District Court of Appeal in the following language:

> [R. 33.] "Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 34.] "The parties agree, as they must, that the covenant, as such, is constitutionally a valid agreement; . . ."
>
> [R. 55.] "The denial of access to the courts does not deprive plaintiffs of their property without due process of law."

---

[1]Petitioners' Points and Authorities in opposition to respondent's demurrer at page 21:

> "As an additional reason why the demurrer filed by the defendants should be overruled, plaintiffs respectfully submit that the refusal of the court to allow them to recover such actual damages as can be proved to have resulted from the breach of the agreement alleged would deprive plaintiffs of property without due process of law, in violation of the Fourteenth Amendment to the Constitution."

[2]Appellants' Opening Brief, pages 68-71:

> "9. Refusal of Remedy will Deprive Appellants of Valuable Property Rights Without Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States."

The right of petitioners to make and enforce contracts guaranteed as a civil right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States was set up and claimed by petitioners' reply brief in the District Court of Appeal of the State of California, Second Appellate District,[3] and in petitioners' petition for a rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of California [R. 19, 20 and 23]. This federal question was not passed upon by the state courts.

The right, privilege and immunity of petitioners under Article I, Section 10, of the Constitution of the United States against the impairing by any state of the obligation of contracts was raised when first it appeared that this right had been violated, *i. e.*, in petitioners' opening brief in the District Court of Appeal[4] and in petitioners' petition for rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 20 and 25]. This federal question was not passed upon by the state courts.

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[3]"It is plain, therefore, that the only civil right involved in this case is the 'right to make and enforce contracts.'"

[4]Appellants' Opening Brief, pages 71-73:

"10. Refusal by a Court to Grant Any Remedy Against a Party to a Valid Contract for the Breach Thereof Is an Exercise of a Legislative Prerogative and Would Impair the Obligation of Contract in Violation of Article I, Section 10 of the United States Constitution. . . ."

Questions Presented.

1. Would a judgment for damages against respondent for breach of her own valid racial restrictive agreement deny her (not another or others) equal protection of the laws, or deprive her (not another or others) of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Has the State of California deprived petitioners of property without due process of law and denied petitioners the civil right to make and enforce contracts, contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States or impaired the obligation of contract, contrary to Article I, Section 10, of the Constitution of the United States?

Statement of the Case.

On or about the 21st day of October, 1944, petitioners Barrows [R. 1] and O'Gara [R. 2] and the ancestor in title of petitioner Pikaar [R. 2], and respondent Leola Jackson [R. 2], each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [R. 2]. By the terms of said agreement each of the signers promised and bound himself, his heirs, executors, administrators, successors and assigns, by a continuing covenant, that no part of his said real property described therein should ever at any time be

used or occupied by any person or persons not wholly of the white or Caucasian race [R. 3]. By the terms of said agreement each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [R. 3].

On or about February 2, 1950, respondent, Leola Jackson, and one, Dorothy May Grace, executed a grant deed to Pearnell Smalley and Florine Smalley [R. 4]. Respondent, Leola Jackson, failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by persons not wholly of the white or Caucasian race, which failure constituted the first breach of respondent's contract complained of by petitioners [R. 5].

On or about September 4, 1950, persons not of the white or Caucasian race moved into and began to use and occupy the property as to which respondent had contracted that it would never at any time be used or occupied by persons not of the white or Caucasian race [R. 4]. Said use and occupancy on or about and after the 4th day of September, 1950, constituted the second breach of respondent's contract complained of by petitioners. As a result of the breaches of contract, and each of them, petitioners have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [R. 5 and 6]. Respondent's demurrer was sustained without leave to amend [R. 16]. The judgment sustaining respondent's demurrer was affirmed [R. 56].

Specifications of Errors to Be Urged.

The District Court of Appeal of the State of California, Second Appellate District erred:

1. In enlarging the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, by erroneously interpreting it to apply to the radically different facts of the case at bar, ignoring the distinctions urged in the briefs of petitioners in the restrictive covenant cases, and apparently adopted by the opinions therein.

2. In basing its opinion upon the speculative effect of a judgment for petitioners upon persons unknown, not parties to the action, and in failing to base its opinion upon the rights of respondent alone.

3. In failing to follow the rule of *Walker v. Whitehead*, 83 U. S. 314, 21 L. Ed. 357, that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable and are both parts of the right which is guaranteed by the Constitution of the United States.

4. In affirming the judgment of the Superior Court.

Reasons for Granting the Writ.

1. The questions presented are federal questions of extreme importance, involving as they do the right to enforce all valid contracts as between the original parties thereto. The questions presented are not peculiar to the enforcement of racial restrictive covenants in damages between the original parties but affect the enforcement of all contracts since every valid contract would be unenforceable against the original parties if it contained a

classification which could not be placed in a statute or ordinance. As applied to racial restrictive agreements alone the questions are of urgent national importance. Numerous cases have been filed in the courts of California, of which the case at bar became the test case. Similar litigation has arisen in Washington, D. C., Missouri, Oklahoma and Michigan, with conflicting results. Home owners in all parts of the United States have an interest in having the Supreme Court of the United States declare that their property in such contracts cannot be taken without due process of law, nor the obligation thereof impaired. The importance of defining and declaring the rights of those particular litigants under the set of facts as therein presented has been recognized in five previous cases, *Corrigan v. Buckley* (1926), 271 U. S. 323; *Shelley v. Kraemer; McGee v. Sipes* (1948), 334 U. S. 1; *Hurd v. Hodge; Urciolo v. Hodge* (1948), 334 U. S. 24. Settlement of these questions by this court is plainly in the public interest.

2. The judgment of the District Court of Appeal of the State of California, Second Appellate District, has decided a substantial and unsettled federal question arising under the Constitution of the United States, which was recognized by Justice Edgerton in his dissent in *Hurd v. Hodge* (1947), 162 F. 2d 233 at p. 240n, but which was left open by this court in *Hurd v. Hodge, supra*, and *Shelley v. Kraemer, supra*. This unsettled federal question has been the subject of speculation in law review articles and annotations.

In his note on page 240 of his dissent in *Hurd v. Hodge* in the United States Court of Appeal for the District of Columbia, Mr. Justice Edgerton used this language:

> ". . . to say that the Constitution forbids direct and actual enforcement of a racial covenant by injunction—the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using the restricted property—is not to say that it forbids awarding to a neighboring property owner, such damages, if any, as an executed sale to a Negro may be shown to have caused."

It is significant that Mr. Justice Edgerton used this language although he was dissenting from the judgment of the court enforcing the covenant by injunction. Although Mr. Justice Edgerton felt that the covenants were contrary to public policy (p. 242), he recognized that the constitutional question and the public policy question were separate and distinct by stating in his note that the constitution did not forbid awarding such actual damages as may be shown to have been suffered. The public policy question is not a federal question[5] and has been decided in petitioner's favor by the District Court of

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[5] "It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this court that they were to be looked to, in connection with the provisions of the revised statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being *'against public policy' does not involve a constitutional question within the meaning of the code provision.*". (Emphasis added.)

Corrigan v. Buckley, 271 U. S. 323, at 330, 70 L. Ed. 969, at 973.

Appeal[6] following an unbroken line of authorities in California[7] and is not subject to review[8].

In his article in 16 University of Chicago Law Review 22, Assistant Professor John D. Frank, after assuming his conclusion extending the opinion in the *Shelley* case, *supra*, beyond its facts and reasoning, expressed this regret on page 24:

> "It is doubtful that the court meant to go so far and some theory of limitation will emerge . . . that a limitation is intended is indicated by the firm emphasis with which the court went out of its way to reaffirm the civil rights cases and to declare that the Fourteenth Amendment erects no shield against merely private conduct, however, discriminatory or wrongful."

The unsettled state of the law after the rendition of the decision in *Shelley v. Kraemer*, *supra*, and *Hurd v.*

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[6]"Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts." [R. 33.]

"We hold that apart from the constitutional issue the complaint states a cause of action for damages." [R. 34.]

[7]The following from *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, is the language of Presiding Justice Shinn, who participated in deciding the case at bar:

> "A right to contract with reference to their own property is one that is reserved to all citizens and, except where restricted by law, is a right which the people of all races may exercise freely . . . The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or a personal belief that the consequences would be for the general good."

[8]*Corrigan v. Buckley*, *supra*.

Hodge, supra, is further illustrated by the following quotation from 3 A. L. R. 2d at page 473:

> "One question which may remain open is that as to the right to maintain an action for damages for breach of a racial restrictive covenant or agreement . . . . Just what effect Shelley v. Kraemer may have on the maintainability of such lawsuits is a question that has not been decided in any of the cases at this writing."

3. There is a direct conflict in the decisions of the highest courts in which a decision could be had in the states of California,[9] Michigan,[10] Missouri[11] and Oklahoma[12] upon the vital constitutional questions involved in this case. The Supreme Court of Michigan and the District Court of Appeal of California have enlarged the opinions in *Shelley v. Kraemer, supra,* and *Hurd v. Hodge, supra,* by interpreting them as preventing any kind of court action based upon a restrictive covenant. The Supreme Courts of Missouri and Oklahoma have held that damages resulting from the breach of racial restrictive covenants could be recovered in their respective state courts.

Any possible distinguishing features among the cases serve but to make more plain the error in the decision of the District Court of Appeal of the State of Cali-

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[9]*Barrows v. Jackson* (1952), 112 A. C. A. 613, 247 P. 2d 99 [R. 30, 58].

[10]*Phillips v. Naff* (1952), 332 Mich. 389, 52 N. W. 2d 158.

[11]*Weiss v. Leaon*, 359 Mo. 1054, 225 S. W. 127.

[12]*Correll v. Earley* (1951), ... Okla. ....., 237 P. 2d 1017.

fornia in *Barrows v. Jackson* [R. 30] and do not remove the direct conflict between the decisions of the courts of last resort of these four states.

4. The District Court of Appeal of the State of California, Second Appellate District, has decided a substantial federal question arising under the Constitution of the United States and has decided it in a way probably not in accord with applicable decisions of this court.

a. This court decided in *Corrigan v. Buckley, supra,* that racial restrictive agreements are valid contracts. That case was recognized and reaffirmed by this court in *Shelley v. Kraemer, supra.* A long line of unbroken authority in the Supreme Court and District Courts of Appeal in California (including this case) established the validity of racial restrictive agreements under the state law of California. Yet the opinion of the state court in this case holds that this valid contract cannot be enforced against respondent, an original signatory, which holding is not in accord with the obvious rule laid down by this court in *Walker v. Whitehead (supra),* that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable. It is self-evident that the property right which each party to a contract has in that contract and which is guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States is the right to relief in the courts against the party to the contract responsible by the terms of their contract for its breach. It may be conceded

that the property right of a party to a contract does not include a right to recover against a stranger to the contract or against a person who, for other reasons (as in *Shelley v. Kraemer*), is not himself a party to the contract. But it is a contradiction of terms and a violation of the rule in *Walker v. Whitehead, supra,* to hold that the valid contract sued upon herein cannot be enforced in damages against respondent, an original party. The opinion of the state court refers in Note 32 [R. 52] to three examples of "valid but unenforceable agreements." All three examples exist in California because of statutes[13] and therefore are terms of the contract as though set forth therein in full.[14] Could a state court, *without the aid of a constitutional statute,* LIMIT the rights of contracting parties as in *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 398, 78 L. Ed. 413, without violating Article 1, Section 10, of the Constitution of the United States? Yet the state court here

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[13]Civil Code of California, Section 3359. "Damages to Be Reasonable. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

Any rule beyond this which a court applied would cause the contract to be void by definition. It is confounding confusion to say that although a contract is constitutionally valid, it is constitutionally unenforceable in any way against anyone, even the original parties.

[14]". . . 'All applicable laws in existence when an agreement is made necessarily enter into it, and form a part of it as fully as if they were expressly referred to and incorporated in its terms.'"

Wing v. Forest Lawn Cemetery Assn., 15 Cal. 2d 472, 476.

has *entirely* DESTROYED ALL of petitioners' rights in this valid contract.

b. This court decided in *Liberty Whse. Co. v. Burley T. G. Coop. M. Assn.*, 276 U. S. 71 at 88, that a person relying upon a constitutional defense must show that he—not another—would be deprived of some right arising under the Constitution of the United States. The same was held in *Tileston v. Ullman*, 318 U. S. 44; *Columbus & G. R. Co. v. Miller*, 283 U. S. 96, 99, 100; and *Ashwander v. T. V. A.*, 297 U. S. 288, 347, 348. In its opinion in *Shelley v. Kraemer, supra*, the same rule was recognized and followed by the repeated use of the words "these petitioners." Accordingly, in order to prevail, respondent should have been required to show that a judgment for petitioners would have deprived her—not another or others—of some right arising under the Constitution of the United States. The decision of the state court herein is not in accord with the above decisions of this court. Nowhere in the opinion [R. 30 to R. 56] is it said that respondent is herself denied any rights under the Constitution of the United States. Frequent reference is made to particular constitutional rights, but never is it said that the rights referred to are respondent's rights. Furthermore, the rights referred to are rights which could not be respondent's rights, to wit:

> "The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would *result* in

> the denial of any civil rights guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to *buy a home and live in it*. Distinction between direct and *indirect* state action is tenuous." (Emphasis added.) [R. 54.]

Respondent would not be prevented from buying a home nor from living in it by this action. Likewise, respondent's rights are not affected directly and they will not be affected indirectly. The words "result," indirect," "buy a home and live in it" are the heart of the opinion and have no application to respondent.

It is evident that the state court has attempted to base its opinion upon the supposed and purely speculative rights of persons unknown, not parties to this action, and upon the *Shelley* case. Although this has the appearance of two grounds for decision there is really only one because the state court has attempted to apply the decision in the *Shelley* case to the case at bar only because of the supposed and purely speculative rights of persons unknown, not parties to this action, all contrary to the decisions of this court and in violation of petitioners' constitutional rights. Surely, strangers do not have more rights in property than the owners thereof. When non-Caucasians are protected in the use and ownership of their own property, after they have acquired it, their constitutional rights are satisfied. They do not have the right of eminent domain in the property of others, and even if they did, it could not be asserted in this action to which they are not parties.

Argument.

According to the brief filed in this Court by the petitioners in *McGee v. Sipes, supra,* the single question presented was as follows:

(Quoting from p. 43.)

> "Does the enforcement by state courts of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups, *when neither the willing seller nor the willing purchaser was a party to the agreement* imposing the restriction, violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?" (Emphasis added.)

The fact that the petitioners were not parties to the agreement and therefore had not consented to the state action was the basis for strong argument in briefs for petitioners in *Hurd v. Hodge, supra.* The other contention relied upon by all petitioners in the restrictive covenant cases was that the contracts were void. The rejection by this Court of the latter contention is evidenced by the reaffirmance of the Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 855, and *Corrigan v. Buckley, supra.* The fact that the opinion of this Court was limited to cases where the individuals before the court were not parties to the contract is evidenced by the consistent application of the statements made in the opinions to "these petitioners" or "petitioners," and by the fact that *all of the authorities cited were examples of state action taken without the consent of the individuals before the court.* None of the authorities cited in the opinions in *Shelley*

v. Kraemer, supra, and *Hurd v. Hodge, supra,* could be cited as analogous in a case involving actual valid consent by the individual before the court by a valid contract without destroying the enforceability of nearly all contracts. If a classification is bad in a contract because it would be bad in a statute, then nearly all contracts must fail because nearly all require the parties to do things which a statute or ordinance could not order them to do. The classifications in contracts are not tested, in an action between the original parties, by the equal protection of the laws rule of reasonable relation to a valid legislative purpose, *i. e.,* public health, welfare, safety, morals, etc., because the original parties have expressly consented to the classification and to the state action of the court in enforcing them.

The District Court of Appeal of the State of California, Second Appellate District, failed to realize that courts of justice cannot and the Constitution of the United States does not require them to completely disregard all considerations of race, especially where all parties before the court have expressly agreed to the classification by valid contract for consideration already received.

Assume a case involving the following facts:

X owns a home in a neighborhood of good friends. For some reason he must sell but does not wish to displease nor injure his friendly neighbors. He lists his home with a real estate broker by a written contract containing the express provision that the dealer must find a Caucasian purchaser in order to earn his commission. The dealer produces a non-Caucasian buyer ready, willing and able to buy, but X will not sell. The dealer sues X for his commission on the theory that the con-

tract is valid and the state court cannot enforce the classification because it would be bad if contained in a statute. The contract is not void, so the court cannot deny relief for that reason. The court must either recognize and enforce the classification consented to by both contracting parties or else allow the dealer his commission.

Assume a second case involving the following facts:

X owns an apartment house. X employs an agent to operate it. A written contract of emplöyment with the agent provides that the agent will not permit any of the apartments to be occupied by non-Caucasians. The agent knowingly permits a non-Caucasian to occupy one of the apartments. The other tenants leave and X suffers loss of rents and profits and perhaps other pecuniary damages. X sues his agent for the damages suffered from the breach of duty. Here is a valid duty; is there no remedy for the breach of it because the court cannot recognize the classification which would be bad in a statute even though here it has been consented to by the individuals before the court?

Assume a third case involving the following facts:

X is a Caucasian. Y represents to X that he is a Caucasian. X marries Y. X learns that Y is not a Caucasian but has used makeup to deceive her. X sues to have her marriage annulled for fraud. Does the Constitution prohibit the courts from recognizing a classification based on race? Here the defendant would not have consented to the recognition by the court of the classification, and the court action would be state action which could not be taken by the legislature.[15]

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[15] *Perez v. Sharp*, 32 Cal. 2d 711. (Miscegenation statute.)

Assume a fourth case involving the following facts:

X is a Caucasian child, the ward of the court and the subject of contested adoption proceedings. B and C are husband and wife of the Caucasian race, of good character and means. D and E are husband and wife of non-Caucasian race, of good character and means. Other things being about equal, the court feels that the welfare of the child would be best served by placing him with the Caucasian husband and wife. Here is state action taken by the court without the consent of D and E based upon a classification which might be bad in a statute.

It must be apparent that a court cannot dispense justice if it is totally blind to the distinctions which nature has created and to which free men have attached importance in their most personal associations. This is so even in cases where the defendant has not consented to the classifictaion, and it must be even more apparent where the race of the litigants is not involved and the action of the court is consented to by all individuals before the court by valid contract for valid consideration already received and enjoyed.

One constitutional right should not be used to destroy another constitutional right, especially by a strained and unnatural application of the first, and most especially in a case where the owners of the first right are not parties to the action. Instead, constitutional rights of individuals before the court should be harmonized if there is a need. In the case at bar the only constitutional right involved is the right of both petitioners and respondent to contract and enforce their valid contract. Respondent has enjoyed the full fruits of her valid contract and is constitutionally bound to answer for its breach.

Suppose John Doe purchased a house and his neighbor came to him and offered him $1,500.00 if he would promise that his house would never be occupied by a non-Caucasian? Suppose John Doe accepted the $1,500.00 cash and gave his written promise to his neighbor? Could he then, after a week or so, permit a non-Caucasian to move into his house without being liable for damages actually suffered by his neighbor from said breach? John Doe has signed a constitutionally valid contract.[16] Does the Constitution protect him in his breach of it?

It is plain, therefore, that individuals may, for consideration, constitutionally contract to do or not to do things which a legislative body cannot order them to do, and that courts, relying on contracts, may give damages for the doing or failure to do things which the court could not order them to do or punish them for doing in reliance only upon an ordinance or a statute or its own substantive or procedural rule. Statutes and other state action taken without the consent of the individual before the court must be tested by the police power test, but contracts do not have to be and cannot be so tested when the original parties to the contract are before the court. Few, if any, contracts could survive the test.

The District Court of Appeal of the State of California, Second Appellate District, failed to give effect to the distinctions existing between *Shelley v. Kraemer, supra,* and the case at bar, to wit: All the authorities cited in *Shelley v. Kraemer* involved state action taken without the consent of the individuals before the court; they were not parties to the contract, and did not even

---

[16]The contract is also valid by the common law of the State of California [R. 34].

know of the covenant until after they purchased the property; they were themselves Negroes; the action sought was injunction; extreme and unwarranted hardships would have resulted to the individuals before the court from the state action, whereas in the case at bar extreme and unwarranted hardship must result to individuals before the court only by this state inaction. No hardship can result to respondent herein beyond that contracted and paid for.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 20, 1952.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

BRIEF FOR PETITIONERS.

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IN THE

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October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The Memorandum Opinion of the trial court [R. 8-16] is unreported. The opinion of the District Court of Appeal [R. 30-56] is reported in 112 Cal. App. 2d 534, 247 P. 2d 99. Rehearing denied September 4, 1952. Hearing in the Supreme Court of the State of California denied October 2, 1952, by a vote of four to three [R. 58].

Jurisdiction.

The order of the Supreme Court of the State of California denying petitioners' petition for hearing was entered on October 2, 1952. (*American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.) Three of the seven justices were of the opinion that a hearing should be

granted [R. 58]. The jurisdiction of this Court is invoked under 28 U. S. C. A., Secs. 1257(3) and 2101(c).

The right of equal protection of the laws and the right to the due process of law claimed under the Fourteenth Amendment to the Constitution of the United States was specifically set up by defendant and respondent in her demurrer to plaintiffs' second amended complaint [R. 8] in the following language:

> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.
>
> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States."

The above rights were urged by respondent in her reply brief in the District Court of Appeal.

The above federal questions were passed upon by the District Court of Appeal in respondent's favor in the following language:

> [R. 32.] "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

[R. 54.] "The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action."

The right, privilege or immunity of petitioners under the Fourteenth Amendment to the Constitution of the United States against being deprived of property without due process of law was set up in the trial court,[1] in petitioners' opening brief in the District Court of Appeal,[2]

---

[1]Petitioners' Points and Authorities in opposition to respondent's demurrer at page 21:

"As an additional reason why the demurrer filed by the defendants should be overruled, plaintiffs respectfully submit that the refusal of the court to allow them to recover such actual damages as can be proved to have resulted from the breach of the agreement alleged would deprive plaintiffs of property without due process of law, in violation of the Fourteenth Amendment to the Constitution."

[2]Appellants' Opening Brief, pages 68-71:

"9. Refusal of Remedy will Deprive Appellants of Valuable Property Rights Without Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States."

and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 19 and 23], and in Petitioners' Petition for Writ of Certiorari at page 3.

The above federal question was passed upon unfavorably to the petitioners by the District Court of Appeal in the following language:

> [R. 33, note 3.] "Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 34.] "The parties agree, as they must, that the covenant as such, is constitutionally a valid agreement; . . ."
>
> [R. 55.] "The denial of access to the courts does not deprive plaintiffs of their property without due process of law."

The right of petitioners to make and enforce contracts guaranteed as a civil right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States was set up and claimed by petitioners' reply brief in the District Court of Appeal of the State of California, Second Appellate District,[3] and in petitioners' petition for a rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of California [R. 19, 20 and 23] and in Petitioners' Petition for Writ of Certiorari at page 5. This federal question was not passed upon by the state courts.

---

[3] "It is plain, therefore, that the only civil right involved in this case is the 'right to make and enforce contracts.'"

The right, privilege and immunity of petitioners under Article I, Section 10, of the Constitution of the United States against the impairing by any state of the obligation of contracts was raised when first it appeared that this right had been violated, *i. e.*, in petitioners' opening brief in the District Court of Appeal[4] and in petitioners' petition for rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 20 and 25] and in Petitioners' Petition for Writ of Certiorari at page 5. This federal question was not passed upon by the state courts.

Questions Presented.

1. Would a judgment for damages against respondent for breach of her own valid racial restrictive agreement deny her (not another or others) equal protection of the laws, or deprive her (not another or others) of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Has the State of California deprived petitioners of property without due process of law and denied petitioners the civil right to make and enforce contracts, contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States or impaired the obligations of contract, contrary to Article I, Section 10, of the Constitution of the United States?

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[4]Appellants' Opening Brief, pages 71-73:

"10. Refusal by a court to Grant Any Remedy Against a Party to a Valid Contract for the Breach Thereof is an Exercise of a Legislative Prerogative and Would Impair the Obligation of Contract in Violation of Article I, Section 10 of the United States Constitution. . . ."

Statement of the Case.

On or about the 21st day of October, 1944, petitioners Barrows [R. 1] and O'Gara [R. 2] and the ancestor in title of petitioner Pikaar [R. 2], and respondent Leola Jackson [R. 2], each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [R. 2]. By the terms of said agreement each of the signers promised and bound himself, his heirs, executors, administrators, successors and assigns, by a continuing covenant, that no part of his said real property described therein should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race [R. 3]. By the terms of said agreement each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [R. 3].

On or about February 2, 1950, respondent, Leola Jackson, and one Dorothy May Grace, executed a grant deed to Pearnell Smalley and Florine Smalley [R. 4]. Respondent, Leola Jackson, failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by persons not wholly of the white or Caucasian race, which failure constituted the first breach of respondent's contract complained of by petitioners [R. 5].

On or about September 4, 1950, persons not of the white or Caucasian race moved into and began to use and occupy the property as to which respondent had contracted that it would never at any time be used or occupied by persons not of the white or Caucasian race

[R. 4]. Said use and occupancy on or about and after the 4th day of September, 1950, constituted the second breach of respondent's contract complained of by petitioners. As a result of the breaches of contract, and each of them, petitioners have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [R. 5 and 6]. Respondent's demurrer was sustained without leave to amend [R. 16]. The judgment sustaining respondent's demurrer was affirmed [R. 56].

Specification of Errors to Be Urged.

The District Court of Appeal of the State of California, Second Appellate District erred:

1. In enlarging the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, by erroneously interpreting it to apply to the radically different facts of the case at bar, and ignoring the distinctions urged in the briefs of petitioners in the restrictive covenant cases, and apparently adopted by the opinions therein.

2. In basing its opinion upon the speculative effect of a judgment for petitioners upon persons unknown, not parties to the action, and in failing to base its opinion upon the rights of respondent alone.

3. In failing to follow the rule of *Walker v. Whitehead*, 83 U. S. 314, 21 L. Ed. 357, that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable and are both parts of the right which is guaranteed by the Constitution of the United States.

4. In affirming the judgment of the Superior Court.

Summary of Argument.

Petitioners feel that the Court below has enlarged the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, beyond the facts and reasoning disclosed in the opinion in that case. All authorities cited in *Shelley v. Kraemer* (*supra*) were cases where state action was taken either by a legislative or a judicial arm of a state against individuals who had not consented to that action. Such authorities can not logically be applied to an action to recover compensatory damages from an original party signatory to a valid contract. A limitation on the opinion in the Restrictive Covenant Cases[5] seems to be indicated by the language of the opinions particularly when viewed in relation to the contentions made in the briefs in those cases.

In addition to what petitioners feel was an erroneous extension of the above mentioned opinions, the Court below found it necessary to base its decision upon the rights of persons unknown not parties to this action in order to apply its interpretation of the opinions in the Restrictive Covenant Cases. This objection is made with all due respect to the Court below. The rights of the litigants were not the bases for the opinions.

The only constitutional right which respondent urged in the Court below was her alleged right to dispose of her property. The opinion of the District Court of Appeal, Second Appellate District, State of California, does not hold that the relief sought by petitioners would deprive *respondent* of the equal protection of this right

---

[5] *Shelley v. Kraemer* and *McGee v. Sipes*, 334 U. S. 1, and *Hurd v. Hodge* and *Hurd v. Urciolo*, 334 U. S. 24.

nor any other. And in fact, respondent has exercised this right in full and petitioners do not complain of that fact. Petitioners complain that a contingency has occurred which respondent promised by a valid contract would not occur. Petitioners seek an opportunity to prove the extent of their actual loss as a result of that occurrence. By her valid contract respondent has sold whatever property right which it might be construed to have deprived her. Respondent had a constitutional right to dispose of all or any part of her property and she exercised that right.

Petitioners and respondent had a constitutional right to contract in the manner alleged in plaintiff's complaint and said contract was and is valid according to the laws of the State of California as the opinion of the Court below held "that apart from the constitutional issue the complaint states a cause of action for damages." [R. 34.] Under these circumstances respondent would not be denied the equal protection of any constitutional right by the state action sought by petitioners. Whereas, by refusing to require respondent to go to trial upon the second amended complaint, petitioners have been deprived of the property and civil right to make and enforce their valid contract.

> "The policy of protecting contracts against impairment *presupposes the maintenance of a government by virtue of which contractual relations are worth while,*— . . . ." (Emphasis added.)
>
> *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 389, 435; 78 L. Ed. 357, 427.

ARGUMENT.

I.

Restrictive Covenant Cases.

Petitioners respectfully submit that in the cases of *Shelley v. Kraemer* and *McGee v. Sipes* (1948), 334 U. S. 1, and *Hurd v. Hodge* and *Hurd v. Urciolo* (1948), 334 U. S. 24, commonly called the Restrictive Covenant Cases, as understood by these petitioners,[6] this Court decided (1) That "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property";[7] (2) That the action of the state courts in enforcing the covenants was state action to be tested by the Fourteenth Amendment to the Constitution of the United States; (3) That the petitioners in those cases were denied equal protection of their rights to acquire, enjoy, own and dispose of property by the judgment of the lower courts enforcing against them contracts to which *none of the petitioners were parties,* and (4) That the respondents in those cases did not have a constitutional right to state action which would deprive those petitioners of equal protection in their right to acquire, enjoy, own and dispose of property.

By far the major portion of the opinion in *Shelley v. Kraemer* is devoted to the second of the propositions, to-wit, that court action is state action. The opinion in *Hurd v. Hodge* approved the four propositions referred to hereinabove and considered two other principles which

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[6]Petitioners realize, of course, that this court knows best how its opinion should be understood.

[7]*Shelley v. Kraemer,* 334 U. S. 1, 10 [R. 37], 19 [R. 39].

have no relevancy to the case at bar originating in a state court, *i.e.*, (1) Section 1978 of the Revised Statute derived from Section 1 of the Civil Rights Act of 1866, and (2) the policy of federal courts: "It is not consistent with the public policy of the Unied States to permit federal courts in the nation's capital to exercise general equitable powers to compel action denied the state courts where said action has been held to be violative of the guarantee of the equal protection of the laws." (*Hurd v. Hodge*, 334 U. S. 24, 35.)

Neither of these opinions expresses the third proposition referred to hereinabove in the language used above, but no exception thereto is likely to be taken by respondent except to the last phrase thereof: "to which none of the petitioners were parties." Neither of these opinions expressly spells out this limitation upon the opinions, but it is respectfully submitted that petitioners may infer such a limitation from the following: (1) The consistent application of all language to "these petitioners," or "petitioners" or "these cases." (2) The recognition that there were two distinct questions, (a) whether the court action therein was state action, (b) whether the state action in those "cases" deprived those "petitioners" of equal protection of constitutional rights.[8] (3) The state action in

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[8]"Against this background of judicial construction, extending over a period of three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements *in these cases* may be deemed to be acts of those states; and if so, whether that action has denied *these petitioners* the equal protction of the laws which the amendment was intended to insure." (Emphasis added.)

Shelley v. Kraemer, 334 U. S. 1, 18.

"It is state action of a particular character that is prohibited."

Corrigan v. Buckley, 271 U. S. 323, 330.

those "cases" deprived those "petitioners" of equal protection of the constitutional rights to acquire, enjoy, own or dispose of property, whereas the relief sought in the case at bar would not deprive respondent of any such rights, as will appear more clearly hereinafter. (4) The use of this condition on page 20:

> "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment it is the obligation of this court to enforce the constitutional command."

(In the case at bar the only "rights subject to the protection of the Fourteenth Amendment" are the rights of the petitions and respondent to contract.) (5) The express affirmance of *Corrigan v. Buckley,* 271 U. S. 323, as to the validity of the covenant in question and the application of the *Civil Rights Cases,* 109 U. S. 3, on the same point. (6) The self-evident conclusion that a valid contract can be enforced in some way against someone. (7) All authorities cited are examples of state action without the consent of the litigant challenging it and could not logically be cited in a case involving actual consent by respondent by valid contract for consideration already received and enjoyed. The reasoning was appropriate to the court action in those cases but not to all court action and seems to be so limited.

The controlling significance of the fact that none of the petitioners were parties to the contracts and an explanation for the failure of the opinions to be more explicit both become apparent from an analysis of the briefs

for the various petitioners filed in the Restrictive Covenant Cases.

In the brief for petitioners in *McGee v. Sipes*, the only question presented was:

> "Does enforcement by state courts of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups *where neither the willing seller nor the willing purchaser was a party to the agreement imposing the restriction* violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?" (Emphasis added.)

Pages 40 and 41 of the same brief contain the following:

> "THE FACT THAT NEITHER PETITIONERS NOR THEIR GRANTORS WERE PARTIES TO THE COVENANT FURTHER EMPHASIZES THE STATE'S RESPONSIBILITY AND PREDOMINANT ROLE IN THE ACTION TAKEN AGAINST THEM.
>
> "Petitioners' grantors have not at any time agreed to refrain from selling their property to Negroes. The restrictive agreement upon which the court predicated its order directing the petitioners to move from their home was signed in 1934 by predecessors in title of petitioners' grantors. Neither petitioners nor their grantors are parties to the agreement.
>
> "If any doubt exists as to the extent or significance of state action involved in court enforcement of a racial restrictive agreement as to occupancy of land between original parties to the agreement, an exam-

ination of the history of 'covenants running with the land' reveals that *insofar as they impose obligations on third persons such covenants are wholly the creature of equity.* . . .

". . . *the rights thus enforced against third persons find their basis in the powers of courts of equity alone.* . . ." (Emphasis added.)

Of special significance at this point are the following statements by one of the co-authors of the above mentioned brief in *McGee v. Sipes* which appears in 7 Lawy. Guild Rev. 99 (May-June, 1947), "Race Restrictions on Ownership or Occupancy of Land," at page 108:

"It is, of course, true that any man may contract freely with reference to his own property. He may even bargain away his own constitutional rights in the process. . . . Whoever wills may traffic in his own constitutional rights. *He may not similarly hawk the rights of others.*" (Emphasis added.)

The significance of the fact that petitioners were not parties to the covenant is emphasized in the consolidated brief for the petitioners in *Hurd v. Hodge*. A key sentence on page 8 thereof is as follows:

"Hence the judicial enforcement of restrictive covenants, against willing sellers and willing buyers, *who have never been parties to the covenant,* violates the Constitution." (Emphasis added.)

A key sentence on page 38 of that brief is as follows:

"This case is of narrow legal compass because it involves a conjunction of *three* special elements: (a)

> The District Court is accomplishing that which if done under express legislative sanction would be unconstitutional, AND (b) The restriction is being applied to persons who have never attempted to contract away their constitutional rights AND (b) The restriction is based solely on race." (No emphasis added.)

The principle in question was again emphasized on page 33 of the consolidated brief for petitioners in *Hurd v. Hodge:*

> "(6) PETITIONERS HAVE NOT ATTEMPTED TO CONTRACT AWAY THEIR CONSTITUTIONAL RIGHTS.
>
> ". . . There is no question here involved of whether Urciolo or any of the grantees may have attempted to contract away their constitutional rights with reference to their property. The fact is that neither Urciolo nor any of the grantees has been a party to any such contract."

It is, of course, true that all the briefs filed in the Restrictive Covenant Cases advanced numerous arguments which, if correct, would have rendered the contracts void, but all such arguments were rejected by the reaffirmance of *Corrigan v. Buckley,* 271 U. S. 323, and the *Civil Rights Cases,* 109 U. S. 3, as to the validity of the contracts between the parties. It seems clear, therefore, from the language of the opinions and from the facts before the court and from the briefs of the prevailing parties that the Restrictive Covenant Cases are limited in their application to state action taken against individuals before the court who had not been parties to the contract relied upon, *i.e.,* without their consent.

II.

Opinion of the District Court of Appeal, Second Appellate District, State of California.

After stating the facts and the contentions of the parties, the opinion of the Court below recognized that the law by which the case at bar must be decided is divided into two main departments, *i.e.*, the common law of the State of California, and the Constitution of the United States. On page 32 of the Record the opinion contains this single sentence paragraph:

> "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."

After some discussion the Court made the following holding [R. 34] settling all non-federal questions in favor of petitioners:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

On the same page of the Record the Court below recognized "that the covenant, as such, is constitutionally a valid agreement; . . . ."

Thereafter, the Court below pursued a course of reasoning which led it to the conclusion that the United States Constitution prevents the enforcement of this constitutionally valid contract in any way against the original contracting parties.

This conclusion was reached as a result of several errors in the course of reasoning followed. First, the Court failed to recognize the principle that the constitutionality of any state action is tested by the rights of the individ-

uals before the court only. In the case of *Liverpool, etc., S. S. Co. v. Commissioner of Emigration* (1844), 113 U. S. 33, the governmental action challenged as unconstitutional was an act of Congress (20 Stat. at L. 177) ratifying retroactively state taxes levied and collected on passengers from foreign lands. On page 39 of that opinion the Court stated a fundamental principle of constitutional law as follows:

> "It (this court) has no jurisdiction to pronounce any statute, either of the state or of the United States, void, because irreconciliable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."

This rule has been applied under a variety of factual situations in the following cases:

Liberty Whse. Co. v. Burley T. G. Coop. M. Assn. 276 U. S. 71, at 88;

Tileston v. Ullman, 318 U. S. 44;

Columbus & G. R. Co. v. Miller, 283 U. S. 96, 99-100;

McCabe v. A. T. & S. F. R. R. Co., 235 U. S. 151, 161-162;

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351.

In *Ashwander v. T.V.A.* (1935), 294 U. S. 288, 347, this Court stated the rule in these words as applied to a statute:

> "5. The court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation (citing cases)."

This rule applies equally in testing state action, whether legislative or judicial.[9] This rule was recognized and followed in *Buchanan v. Warley*, 245 U. S. 60, 73, when the court said:

> "In this case the property rights of the plaintiff in error are directly and necessarily involved."

The opinion of the Court below shows that that Court failed to recognize that the opinions in the Restrictive Covenant Cases followed the above rule. As a consequence, the opinion of the Court below erroneously states on page 35 of the Record the holding concerning the Restrictive Covenant Cases:

> "The admonition of these cases is that a state may not by judicial process enforce private rights derived from consensual agreements of private individuals where to do so would result in the infringement of civil liberties[10] guaranteed by the Constitution of the United States."

This statement is erroneous in that it fails to include the words, "civil liberties of the individuals before the courts," *i.e.*, "litigants." The reality of this error is more apparent in view of the statement on page 36 of the Record:

> "The Supreme Court of the Unied States in these cases [Restrictive Covenant Cases] held: . . . (3)

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[9] "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."
Shelley v. Kraemer, 334 U. S. 1, 22.

[10] What civil liberties? Petitioners' right to make and enforce contracts is a civil liberty.
Civil Rights Cases, 109 U. S. 3, 22.

> In granting judicial enforcement of such private agreements the courts of Missouri and Michigan acted to deny the excluded *races* the equal protection of the laws, contrary to the Fourteenth Amendment; . . ." (Interpretation and emphasis added.)

This error led the Court below to the equally erroneous belief that the case at bar could be decided upon the supposed rights of the "excluded races" rather than upon the rights of the litigants. This erroneous major premise is evidenced in many other passages of the opinion, *i.e.*, wherever the opinion refers to constitutional rights, it either neglects to specify whose rights, or else specifies rights which could only belong to persons unknown, not parties to this litigation.

After quoting extensively from the opinions in the Restrictive Covenant Cases and from opinions in other jurisdictions, the opinion below then stated the following minor premise on pages 54-55 of the Record:

> "The fact that the non-Caucasion is not a party to the action and that an award of damages operates against a covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interests of the particular non-Caucasian would be secure and unaffected by any judgment rendered. *However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights* because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages."

From these major and minor premises the opinion of the Court below reached the conclusion that [R. 56]:

> "In the light of the Restrictive Covenant Cases it is the duty of the courts of this state to refrain from exerting judicial power to give legal sanction and effect to racial restrictive covenants in an action at law for damages."

The language above quoted shows that the Court below failed to adjudicate the rights of these litigants in the case at bar. No comment is necessary to establish conclusively the error of the major premise relied upon by the opinion of the Court below. The minor premise, based as it is on speculation and generalities and unsupported by anything in the Record is equally vulnerable to attack. However, this minor premise is so totally irrelevant to the determination of the constitutional questions in this case, *i.e.*, the rights of these litigants, that the impulse to attack it must be resisted.

After recognizing that according to the law of California, plaintiff's complaint states a good cause of action, the opinion in the Court below has failed to find any constitutional right which respondent would be denied by requiring her to go to trial on the issues raised in that complaint.

Other errors appear in the opinion of the Court below, some of which will be noted under later headings of this brief. A few will be noted here. Attention is directed to the following on pages 36 and 37 of the Record:

> "The Supreme Court of the United States in these cases (Restrictive Covenant Cases) held: . . . (4) Denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements."

This statement is inaccurate by reason of the fact that it fails to include the additional words: "when such enforcement would deny the defendants their rights to acquire, enjoy, own and dispose of property." This error is material in the case at bar because the respondent would not be denied any rights to acquire, enjoy, own and dispose of property, nor any other constitutional right by the enforcement of her contract in damages against her. Therefore, failure to enforce it in that way deprives petitioners of their property without due process of law.

Attention is also directed to the error in interpreting the opinion in *Gandolfo v. Hartman* (C. C. S. D. Cal., 1892), 49 Fed. 181, as evidenced by the statement on page 35 of the Record that that case held "enforcement of racial restrictive covenants . . . invalid on constitutional grounds." The holding of the *Gandolfo* case was that the contract itself was *"absolutely void"* as (1) contrary to the public policy of the Government, (2) in contravention of a treaty, and (3) in violation of the Constitution. The *Gandolfo* case was cited and relied upon by all petitioners in the Restrictive Covenant Cases and by eight of the briefs *amici curiae*, yet it was not even mentioned in the opinions in those cases except in a footnote and was necessarily repudiated by the express reaffirmance of *Corrigan v. Buckley*, 271 U. S. 323, establishing the validity of the contracts.

Petitioners respectfully submit that upon the authority of the opinions in the Restrictive Covenant Cases the Court below should have reversed the judgment of the trial Court and the order sustaining respondent's demurrer.

III.

Opinions of the Supreme Court of Michigan[11] and of the United States District Court, in and for the District of Columbia.[12]

A. Phillips v. Naff.[11]

Although the opinion in this case contains some erroneous generalities, the result reached is justified. The first basis relied upon by the opinion was the fact that the covenant sued upon was not personal to the owner. It reads, in material part, as follows:

> "The undersigned owners or purchasers of land . . . each does hereby severally covenant . . . *that said lands shall . . . be subject* to the covenants, agreements and restrictions herein contained which shall run with the land." [See p. 6, Record on Appeal in that case.] (Emphasis added.)

The agreement nowhere provides that the signers will be bound by anything, nor that the owners shall be bound by anything. The defendants in *Phillips v. Naff* did not bind themselves that no part of their real property should be used or occupied by non-Caucasians as the respondent at bar did [R. 3]. The defendants in *Phillips v. Naff* were not original contracting parties and did not hold title at the time the land in question was occupied by non-Caucasians. Therefore, the following rule from 15 Cor. Jur. 1301 would apply:

> "As a general rule, liabilities cannot be transferred nor assigned; but there is an exception to this rule in case of covenants running with the lands, in which case a grantee is liable for breaches which occurred

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[11] *Phillips v. Naff*, 332 Mich. 389, 52 N. W. 2d 158.

[12] *Roberts v. Curtis*, 93 Fed. Supp. 604.

"*while he holds the estate in the land.* The original covenantor remains liable and may be sued upon his express covenant, even though they are covenants which run with the land and the land has been assigned." (Emphasis added.)

The Michigan Court pointed out at the end of that first point on page 160 (52 N. W. 2d) that the defendants were not parties to the agreement imposing the restrictions.

The second basis for the decision was reliance upon the opinions in the Restrictive Covenant Cases. The opinion contains many comments which violate the settled rule referred to hereinabove that the constitutionality of state action must be tested by the rights of litigants only.

Beginning with the first paragraph on page 162 (52 N. W. 2d), the Michigan Court began to develop the third objection of the enforcement of the covenant in that case, *i. e.*, indirect restraint upon alienation. The Court based this objection upon a reluctance to sell which would be caused by permitting recovery of damages in that case. The Court failed to notice that the sale had already taken place. The Court also failed to notice that there would be no more of a deterrent to alienation resulting from liability for damages than was caused by the long line of Michigan cases permitting injunction against use and occupancy. What this Michigan Court did, without realizing it, was to reverse the long line of Michigan cases which recognized the distinction between covenants against sale and covenants against use and occupancy; the first being an illegal restraint on alienation and void; the latter being no restraint and valid. It is clear from the first paragraph on page 162 (52 N. W. 2d) of the opinion

that the Court was led into confusing covenants against use and occupancy and covenants against sale.

This third basis for the decision in *Phillips v. Naff* and likewise the first basis mentioned hereinabove involved non-federal questions which could not have been the basis for seeking a writ of certiorari from this Court. In the case at bar all the non-federal questions have been decided in favor of petitioners by the holding on page 34 of the Record that:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

B. Roberts v. Curtis.[12]

It should be noted that this is the opinion of the trial court in the District of Columbia. The very brief opinion written by Judge Holtzoff relies solely upon the Restrictive Covenant Cases. It is apparent from a reading of his opinion that he has misinterpreted the ruling in both cases on the question of enforcibility; and his opinion clearly misstates the holding of the *Hurd* case on the question of public policy. The only policy referred to in the *Hurd* case was the policy of federal courts which prevents federal courts from acting in a way in which state courts could not act because of some constitutional limitation. This Court did not state a policy against the agreement but instead affirmed the *Corrigan* case which held the agreement valid. Nor does it state a public policy against enforcement except where state courts could not enforce it, that is, by injunction without consent of the individuals before the court.

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[12] *Roberts v. Curtis*, 93 Fed. Supp. 604.

The above proposition is made abundantly clear by the summary to the *Hurd* case appearing in 92 L. Ed. page 1187:

> "In a District of Columbia case involving restrictive covenant against Negro ownership or occupancy, the Supreme Court, . . . found it unnecessary to pass upon a contention of violation of the due process provisions of the Fifth Amendment, on the ground that the enforcement of such covenant would (a) violate the Civil Rights Act, which was construed as applicable in the District of Columbia, and (b) be contrary to the public *policy of the United States not to permit action to be taken in federal courts which is forbidden by the Constitution to be taken in state courts.*" (Emphasis added.)

This summary is an accurate statement of the holding of this Court in the *Hurd* case on the question of policy, as is shown by the following language from page 35 of the United States Reports:

> "We are here concerned with action of federal courts of such a nature that *if taken by courts of the state would violate the prohibitory provisions of the Fourteenth Amendment.* Shelley vs. Kramer (U. S.) *supra.* It is not consistent with the public policy of the United States to permit federal courts in the nation's capitol to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guarantee of the equal protection of the laws." (Emphasis added.)

The same idea is expressed by Mr. Justice Frankfurter in his concurring opinion in the following language:

> "In good conscience, it cannot be 'the exercise of a sound judicial discretion' by a federal court to

grant the relief here asked for *when the authorization of such an injunction by the states of the union violated the Constitution*—and violated it, not for any narrow technical reason, but for considerations that touch rights so basic to our society that, after the Civil War, their protection against invasion by the states was safeguarded by the Constitution." (Emphasis added.)

IV.

Answer to Anticipated Arguments.

A. Respondent's Constitutional Right to Dispose of Her Property.

As has been pointed out heretofore, the constitutionality of state action must be tested by the constitutional rights of the litigants.[13]

The only constitutional right claimed by respondent in the courts below has been this right to dispose of her property. The right to dispose of property, like the right to make and enforce contracts, is a civil right guaranteed by the Fourteenth Amendment to the Constitution of the United States. See *Civil Rights Cases*, 109 U. S. 3, 22, and *Shelley v. Kraemer*, 334 U. S. 1, 10 [R. 37], 19 [R. 39].

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[13] *Liverpool, etc., S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39;
Liberty Whse. Co. v. Burley, etc., Assn., 276 U. S. 71, 88;
Tileson v. Ullman, 318 U. S. 44;
Columbus, etc., Co. v. Miller, 283 U. S. 96, 99-100;
Ashwander v. T.V.A., 297 U. S. 288, 347-348;
McCabe v. A. T. & S. F. R. R. Co., 235 U. S. 151, 161-162;
Missouri ex rel. Gaines v. Canada, 304 U. S. 337, 351;
Buchanan v. Warley, 245 U. S. 60, 73.

This right to dispose of property is one which has received frequent recognition by the courts, both state and federal. It is well expressed in the following two statements quoted by respondent in her brief in the District Court of Appeal, Second Appellate District, State of California:

> "The right to acquire and possess property guaranteed by the Constitution includes the rights to dispose of it *or any part of it.*" (Emphasis added.)
>
> *Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 575.

> "From the very power which a man possesses over his own property, it follows that he can dispose of it in any manner he may see fit . . ."
>
> *Dana v. Stafford,* 10 Cal. 269, 277.

As respondent said in commenting on these quotations, "these are old cases but they have never been overruled precisely because the principle they enunciate is so fixed in our constitutional system."

Petitioners submit that the case at bar has no relation to respondent's right to dispose of her property, or any part of it. It should be noted first, that respondent has fully exercised her right to dispose of her property [R. 4 and 34]. Nowhere in their complaint, nor in their briefs, have petitioners complained of the exercise of this right of respondent to dispose of her property. Petitioners have been damaged by the happening of a contingency which respondent promised would not happen.

Respondent did not promise not to sell to non-Caucasians; but if she had made a promise against sale, that would have raised a non-federal question of restraint on alienations; *it would not have raised any constitutional*

question. The Constitution would permit her to se "any part of her property." To use the helpful illustra tion of a bundle of sticks, the total rights which a perso may have in his property is like a bundle of sticks. Th owner may sell one of these rights and retain the balan of the bundle which she may sell at a later date. How ever, having exercised her constitutional right to sell on of these sticks, she does not thereafter have any constitu tional right to the stick which she has sold. So in th case at bar, if respondent had promised that she woul not dispose of her property to non-Caucasians, she coul not thereafter claim that she still had that constitution right because that stick would have been sold by he promise for consideration. In an action against he alone for damages after sale, she could not say that money judgment against her would deprive her of an constitutional right because she had deprived herself o it by selling it. Under these *assumed* facts responde could make the non-federal defense that her promise wa void in California as a restraint on alienations, but sh would have no *constitutional* defense because she could no be deprived of a constitutional right after having exe cised her constitutional right to sell it.

Under the facts of the case at bar, respondent has n such non-federal defense [R. 34] because her promise one against use and occupancy, which is not a restrai upon alienation;[14] and she has no constitutional defen because *by her contract she has sold whatever proper right which it might be construed to have deprived he*

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[14] *Los Angeles Investment Co. v. Gary,* 181 Cal. 680; *Janss Investment Co. v. Walden* (1925), 196 Cal. 753; *Wyat v. Patee* (1928), 205 Cal. 46.

B. Public Policy.

Although respondent has not advanced the defense that her contract is void as against public policy, that argument was advanced by the brief of *amici curiae* in her behalf filed in the District Court of Appeal, Second Appellate District, State of California; and all of the briefs for petitioners in the Restrictive Covenant Cases and nearly all of the *amici curiae* briefs filed on behalf of petitioners therein contain elaborate and documented arguments on the question of public policy. For this reason it is thought advisable to consider this non-federal question.

Insofar as this case is concerned the question of the validity of the contract sued upon against the attack of public policy was conclusively resolved in petitioners' favor by the holding on page 34 of the Record that:

> "We hold that apart from the constitutional issue the complaint states a cause of action for damages."

The law of California is so well settled on the question of public policy as applied to restrictive covenants that the court below could not have ruled otherwise. At the time of the decision in the case of *Gandolfo v. Hartman*, 49 Fed. 181, a federal court might have felt empowered to reach a conclusion based on the common law power to declare contracts void as against public policy where the state courts held otherwise. However, since the landmark case of *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64, 78, it is recognized that no such power exists:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a state, whether they be

> local in their nature 'or general,' be they commercial law or a part of the law of torts. And no clause of the Constitution purports to confer such a power upon the federal courts."

As mentioned above, all the briefs for petitioners in the Restrictive Covenant Cases and nearly all of the briefs *amici curiae* filed on behalf of the petitioners therein contained elaborate and documented arguments on the question of public policy and it was seriously urged that the covenants should be declared void for that reason. Yet this Court decided the *Shelley* case on a constitutional question thereby rejecting the public policy arguments. This is even more significant in view of the rule uniformly followed by this Court that:

> "4. The Court will not pass upon a constitutional question although properly presented by the Record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter."
>
> *Ashwander v. T. V. A.*, 297 U. S. 288, 347.

This Court had this principle in mind when writing the opinions in the Restrictive Covenant Cases as evidenced by footnote 6 to *Hurd v. Hodge*, 334 U. S. 24 at 30.

Finally, both opinions in the Restrictive Covenant Cases confirmed the case of *Corrigan v. Buckley*, 271 U. S. 323, on the question of validity.

C. United Nations Charter.

Since nearly all of the briefs filed on behalf of petitioners in the Restrictive Covenant Cases insisted that the covenants were void because of the United Nations Charter, it may be expected that these arguments will likewise be advanced by the respondent or by *amici curiae* in her behalf. Like the public policy argument, this contention was also rejected by this Court by basing its decision in *Shelley v. Kraemer* upon constitutional grounds.[15]

It is clear that the United Nations Charter is not self-executing.

> "The treaty is, in its nature, a contract between two nations, not a legislative act: It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—*when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department;* and the legislature must execute the contract, before it can become a rule of the court."
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> *Foster v. Neilson* (1829), 27 U. S. 64 (2 Pet. 253, 313-314).

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[15] *Ashwander v. T.V.A.*, 297 U. S. 288, 347.

See also:

Edye v. Robertson (1884), 112 U. S. 580;

Robertson v. General Elec. Co. (1929), 32 F. 2d 495;

Ex parte Dove, 49 F. 2d 816;

Aguilar v. Standard Oil (1943), 318 U. S. 724, 728;

Fujii v. State of California (1952), 38 Cal. 718;

48 Mich. L. R. (April, 1950), 852.

Concerning the provisions of Article 55 of the United Nations Charter, Professor Joseph L. Kunz, a member of the Board of Editors of the American Journal of International Law, stated:

> "They do not constitute legal norms, but only guiding principles. The 'United Nations shall promote and encourage,' 'assist in the realization,' 'make recommendations,' 'promote universal respect and observance of human rights;' it cannot protect them, it cannot take action apart from the case that the violation of human rights constitutes a danger to peace . . .
>
> "As the corresponding articles of United Nations Charter contain only a program of peace, not legal norms, and as they do not define these rights and fundamental freedoms, it is obviously necessary to create legally binding norms, defining these rights, taking them out of the matters essentially within domestic jurisdiction and establishing a machinery of international enforcement." (43 Am. Jur. Int. Law 316, 317-318.)

In his report to the President concerning the United Nations Charter, Edward R. Stettinius, Jr., Secretary

of State and Chairman of the United Nations Delegation to the San Francisco Conference, said:

> "On the other hand, the view was advanced that the further elements in the Australian proposal calling for national action separate from the international organization went beyond the proper scope of the charter of an international organization and possibly even infringed on the domestic jurisdiction of member states in committing them to a particular philosophy of the relationship between the government and the individual.
>
> "The pledge as finally adopted was worded to eliminate such possible interpretation. It pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization *without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.*
>
> "To remove all possible doubt on this score the following statement was unanimously approved and included in the record of the Conference (Report of the Rapporteur of Committee 3 of Commission II):
>
> "'The members of Committee 3 of Commission II are in full agreement that nothing contained in Chapter IX [which contains Articles 55 and 56] can be construed as giving authority to the organization to intervene in the domestic affairs of domestic states.'" (Emphasis added.) (Hearings before the Committee on Foreign Relations U. S. Senate—Revised—July 9-13, p. 34, 105-106.)

The briefs in support of the petitioners in the Restrictive Covenant Cases attached considerable importance

to the holding of a trial judge in *Re* Drummond Wren, Ontario R. 778, 4 D. L. R. (1945) 674, as to the effect of public policy and the United Nations Charter on restrictive covenants. This case was never appealed but the opinion was cited and completely repudiated by the Court of Appeal of Ontario in *Re* Noble and Wolf, Ontario Weekly Notes (1949) at page 484. The following is quoted from page 487 of the Ontario Weekly Notes (1949) as part of the report of the latter case:

> "Henderson, J. A., after stating the facts said that in his opinion the reasons for judgment of Schroeder, J., were right and the judgment in *re* Drummond Wren, *supra,* was wrong in law and should not be followed."

From page 488 of the same report:

> "Hope, J. A., said he agreed fully with Robertson, C. J. O., and with the conclusion reached by other members of the court. In view of the reliance placed on the decision in *re* Drummond Wren, *supra,* his Lordship wished to add that in his opinion freedom of the individual in and under a democracy had implicit in it, as an absolute, the freedom of association (citing authorities).

And from page 489 of the same report:

> "The present case, in his Lordship's opinion (Hogg, J. A.) cannot be brought within any of the classes to which the principle of public policy, as recognized by law, was applicable. It was urged that the doctrine of public policy should be extended because of

the principles expressed and adopted in the various international charters and documents mentioned in *re* Drummond Wren, *supra,* and because of the opinions expressed in judgments of the Supreme Court of the United States. In this respect his Lordship agreed with Schroeder, J., and he could not conclude that the covenant now under consideration could be held void upon the grounds of public policy." (Interpretation added.)

Re Noble and Wolf, supra, was appealed to the Supreme Court of Canada and is reported in Canada Law Reports as *Noble, et al. v. Alley* (1951), S. C. R. 64. The opinion of the Court of Appeal of Ontario on the questions of public policy and the United Nations Charter was not disturbed by the opinion of the Supreme Court of Canada. However, the Supreme Court of Canada held that the covenant sued upon was void as a restraint on alienation (covenant against sale) and unenforcible for uncertainty and did not touch and concern the land and therefore did not run with the land and for these reasons the lower courts were reversed. All of the objections sustained by the Supreme Court of Canada would be non-federal questions in the United States and have been conclusively decided in petitioners' favor by the court below [R. 34].

It would appear that the United Nations Charter is not considered self operating in Canada any more than it is in the United States.

V.

Respondent's Brief on Certiorari.

In view of the arguments heretofore presented in this brief it is not felt that comment upon respondent's brief on certiorari is necessary except as to the following statement on page 7 thereof:

> "At this posture of the case petitioners interject the contention that respondent is bound by her 'contract' and that she 'waived' her civil right to dispose of her property as she saw fit."

Petitioners wish to make clear that they do not rely on a mere "waiver." As pointed out in Point IV(A) above, if respondent lost any right to dispose of her property, it was because she sold that particular right from her bundle of rights, which she had a constitutional right to do. The word "waiver" is often loosely used and is frequently used to refer to situations where no actual consent by contract exists, and sometimes where consent cannot even be implied. It is likely, then, that respondent could produce cases villifying "waiver" in these non-consensual cases and try to apply them to this case, although the only similarity would be this word "waiver" introduced by respondent herself.

The word "waiver" is sometimes used in a sense that might apply to the case at bar. An example may be drawn from the long and scholarly brief filed by one of respondent's counsel in the District Court of Appeal, Second Appellate District, in the case of *Anderson v. Auseth*, L. A. 19759. At page 35 thereof the following appears:

> "It seems plain, then, that in view of the provisions of the state constitution an owner of land may not be forbidden to use his own land unless he waives that

right, *either by becoming signatory to the agreement* or through failing to assert his right at the very earliest moment open to him."

Petitioners respectfully submit that whatever state action occurs in the case at bar occurs by respondent's express consent by a contract which is valid both under the Constitution [R. 34][16] and the common law of California [R. 34].

The controlling influence of consent may be illustrated by quotations from a few cases:

> "A lien under a levy is a vested right of which one cannot be deprived without his *consent.*" (Emphasis added.)
>
> *In re Bear* (1881), 8 Fed. 429.

> "Holder of stock on which cumulative dividends has accrued has vested rights, which may not, *in absence of prior consent,* be extinguished, in corporate surplus which might be applied in payment thereto." (Emphasis added.)
>
> *Yoakum v. Province Baltimore Hotel* (1929), 34 F. 2d 533.

> "It must be conceded, however, that where the United States becomes a party to commercial paper, it impliedly *consents* to be bound by the same rules governing private persons under the same circumstances." (Emphasis added.)
>
> *United States v. First National Bank* (1942), 131 F. 2d 985 at 987.

---

[16] *Buchanan v. Warley*, 245 U. S. 60; *Shelley v. Kraemer*, 334 U. S. 1.

"6. The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. (Citing cases.)"

Ashwander v. T. V. A. (1935), 297 U. S. 288, 347.

This last citation has reference to implied consent. How much more obvious would the rule be if the individual before the court had expressly ratified the statute by his valid contract? In the case at bar respondent has availed herself of her constitutionally guaranteed civil right to make and enforce this contract and has enjoyed it since 1944. She has no color of right which would be denied equal protection by the state action sought in the case at bar. If any could be imagined, respondent has sold it.

"It is, of course, true that any man may contract freely with reference to his property; he may even bargain away his own constitutional rights in the process."

Loren Miller, "Race Restrictions on Ownership or Occupancy of Land," 7 Lawy. Guild Rev. 99, 108 (May-June, 1947).

"'. . . but if the state court will compel the white man not to sell to a Negro, even though he is now willing to do so, because the white man has covenanted with other white owners not to do so, the state is defeating the Negro's interest in the white man's freedom, to which the Negro is supposed to have a constitutional right. . . . The parties to the covenant have given up, not only their own constitutional

rights, *as they may well do,* but also the constitutional rights of other people. . . . .' Hale, Rights Under the Fourteenth and Fifteenth Amendment Against Injuries Inflicted by Private Individuals, 6 Lawy. Guild Rev. 627, 633-4 (1946)."[17]

The above is quoted from pages 25-26 of the brief of the American Civil Liberties Union *amicus curiae* filed on behalf of petitioner in the Restrictive Covenant Cases. (Emphasis is added to the phrase considered significant here.)

A slight deviation from our subject is considered necessary at this point in order to clarify the first sentence quoted above from Prof. Hale. That sentence contemplates a state of facts such as existed in the case of *Corrigan v. Buckley,* 271 U. S. 323, where the white defendant seller was a party signatory of the contract and the remedy sought was injunction against a willing seller and a willing buyer. Only by injunction can the court "compel the white man not to sell to a Negro" and only in an action for injunction would any right of the Negro be within the jurisdiction of the court to determine. In

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[17]A similar idea is expressed in the article by Professor McGovney, "Racial Residential Segregation," 33 California Law Review, 5, 21:

> *"There is nothing unjust in holding him [the contracting party] to his bargain insofar as he alone is concerned,* but the state is denied power to enforce it [the covenant] because enforcement would work a prohibited discrimination against the buyer because of his race." (Emphasis and interpretation added.)

an action for damages against the contracting party only, the Negro would not be prevented from buying but instead, would already have purchased [R. 55],[17a] and it is absurd to suggest that the Negro has a "constitutional right" in the "white man's freedom,"[18] but in any event his rights would not be before the court.[19]

VI.

Petitioners and Respondent Have a Constitutionally Guaranteed Property and Civil Right to Make and Enforce Their Contract.

A contract between petitioners and respondent has been alleged: These allegations are admitted by the demurrer. The Court below has made the conclusive holding on the non-federal question that a cause of action for damages for breach of a valid contract is stated [R. 32 and 34]. Under these circumstances petitioners have constitutionally

---

[17a]When non-Caucasions are protected in the use and ownership of their own property, after they have acquired it, or contracted to acquire it, their constitutional rights are satisfied.

[18]"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

Shelley v. Kraemer, 334 U. S. 1, 22.

[19]*Liverpool, etc., S. S. Co. v. Commissioner of Emigration,* 113 U. S. 33, 39;

Ashwander v. T.V.A.; 294 U. S. 288, 347-348;

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351.

recognized and protected property rights.[20] Of the "fundamental rights which are the essence of civil freedom" enumerated by this court in the opinion in the *Civil Rights Cases,* 109 U. S. 3 at 22, the first civil right on the list is the "right to make and enforce contracts." It is inconceivable that a court of law would expressly hold that a contract is valid and that the complaint states a cause of action and yet refuses to enforce it against the original contracting parties. The Court below would not have refused to do so had it not been for the erroneous

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[20] "Valid contracts are property, . . ."
Lynch v. United States (1934), 292 U. S. 571, 580.

See:
Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317.

"The idea of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."
Home Bldg. & Loan Assn. v. Blaisdell (1933), 290 U. S. 398, 430;
Von Hoffman v. Quincy, 4 Wall. 535, 550, 552, 18 L. Ed. 403, 408-409.

See also:
Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357, 358.

"It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; . . ." (Emphasis added.)
Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 439, 47 L. Ed. 249, 250.

"It is true that what is prohibited (by the obligation of contracts clause) is legislative action . . . *The power that is here denied the legislature was not reserved to the courts* . . . it is yet to be suggested that included in these powers (of courts) is the power to nullify or impair a *legal contract* solemnly and intelligently entered into between competent parties." (Interpretation added.) (Emphasis added)
Galey v. Guffey, 248 Pa. 523, 528, 94 Atl. 238.

belief that the Constitution of the United States would not permit the enforcement sought. The fallacy of this belief is pointed out hereinabove and it is clear that where no valid reason exists for the refusal of the court below to permit a trial on the merits, the petitioners have been deprived of their property without due process of law.

The consent of respondent to the state action sought is commented upon in the opinion of the Court below on page 55 of the Record as follows:

> "An individual cannot consent to state court action, the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation and *thus deny to a class of citizens* the equal protection of the law." (Emphasis added.)

The court below has already held that a valid contract existed between petitioners and respondents [R. 32-34]. It is a contradiction of terms to say that the petitioner has not consented because consent is one of the elements necessary to the existence of the valid contract. If in fact consent were lacking, it would be a matter of defense to be set up in the answer and determined at the trial. The existence of respondent's actual consent is a factual matter conclusively proven by her signature. *It is clear that the Court below is again basing its conclusion upon the erroneous premise that "a class of citizens" not parties to this action have rights in this matter.*

We continue the above quotation [R. 55]:

> "The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect."

The end sought by petitioners in this action is to recover the loss they have sustained as a result of the breach

of respondent's valid contract. The court below is again trying some other case rather than the case between these litigants.

It is irrelevant to speculate on the effect of a judgment for petitioners on strangers to this action, but even the speculation indulged in fails to comport with many indisputable facts;[21] one of which is that restrictive covenants do not prevent use and occupancy by non-Caucasians. Assuming such an irrelevant tendency, the premise that "the law prohibits the end" is untenable. What law prohibits "the end?"

> "It is admitted that the Federal Constitution did not preclude the owner of any piece of property sought to be covered by such agreement from freely picking and choosing among the persons whom he would permit to use or occupy his property as guests, lessees or purchasers on the basis of race, religion, color, personality, education, occupation or on the basis of absolute whim and utter caprice." (Brief for petitioners in *McGee v. Sipes*, p. 34, fn. 49.)

Whatever respondent had a constitutional right to do she had a constitutional right to promise to do.

> "It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property, . . ."
>
> *Corrigan v. Buckley*, 271 U. S. 323, 330.

> "To say that the Constitution forbids direct and actual *enforcement* of a racial covenant by injunc-

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[21]The impulse to elaborate on this speculation which formed the minor premise of the decision below must again be resisted due to its irrelevance to the constitutional rights of these litigants.

> tion—the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using the restricted property—is not to say that it forbids awarding to a neighboring property owner such damages, if any, as an executed sale to a Negro may be shown to have caused."

Dissent of Edgerton, A. J., in *Hurd v. Hodge*, 162 F. 2d 233, 240, Note 22.

There is no justification either in reason or in precedent to assert that the "law prohibits the end" contemplated by the irrelevant speculation of the opinion below. The only precedent relied upon is *Shelley v. Kraemer* which (Petitioners respectfully submit) is not authority for that statement. The *Shelley* case was concerned with a "means" only. Nothing but the "means" as it affected those "petitioners" was before the court. The *Shelley* case would only be authority in a case where litigants similarly situated, *i. e.*, non-consenting, were affected by the same "means." The *Shelley* case outlawed no "end." On the contrary, it reaffirmed *Corrigan v. Buckley.*

All of the speculation indulged in by the opinion below regarding the supposed indirect effect of the case at bar upon persons unknown not parties to this action is irrelevant to a determination of the constitutional rights of these litigants.

> "The policy of protecting contracts against impairments *presupposes the maintenance of a government by virtue of which contractual relations are worth while,* . . . ." (Emphasis added.)
>
> *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 398, 435, 78 L. Ed. 357, 427.

Conclusion.

Nothing should be permitted to obscure the fact that respondent must satisfy this Court that the court action sought by petitioners would deprive her, not another or others, of the equal protection of some constitutional right. Surely it must be clear that the contrary is true. All state action sought has been expressly contracted for. The Constitution itself assumes the enforcibility of valid contracts in courts of law as a premise.

Petitioners respectfully request that the judgment of the District Court of Appeal, Second Appellate District, State of California, be reversed with appropriate order.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEONA JACKSON,
Respondent.

RESPONDENT'S BRIEF ON CERTIORARI.

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RESPONDENT'S BRIEF ON CERTIORARI.

Question Presented.

Although the issue is somewhat obscured by Petitioner's arguments on collateral matters the question presented here is whether or not judicial cognizance of a damage action against the signer of a race restrictive covenant, whose sale of race restricted real property eventuates in its occupancy by a Negro, is permissible state action.

Statement of the Case.

Respondent owner of a lot signed a race restrictive covenant in 1944 proscribing Negro occupancy. On February 2, 1950, she conveyed the lot to predecessors in title of Negro occupants. On September 3, 1950, she vacated the premises and the next day Negroes began occupancy. It is alleged that she vacated in order to "permit persons known to her to be other than the Caucasian

race" to move into the premises. She failed to include the proscriptive clause in her deed of February 2, 1950, as she had covenanted to do.[1] Because California has long held that covenants against the sale of land to persons of particular racial groups contravene its statutory and public policy against restraints on alienation,[2] Petitioners predicated their suit on the theory that the occurrence of non-conforming occupancy, *per se*, gave rise to a cause of action for damages against Respondent and in favor of Petitioners who were signers of the agreement.

Basing its decision on *Shelley v. Kramer*, 334 U. S. 1, the trial court sustained a demurrer without leave to amend as against all Petitioners and ordered judgment for Respondent. Also relying on *Shelley*, the California District Court of Appeal affirmed the judgment of the trial court. The California Supreme Court denied a petition to hear the case after decision by the District Court of Appeal.[3]

Petitioners are here on petition for certiorari.

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[1]The covenant was recorded and in California recordation of such an instrument imparts notice of its terms to subsequent purchasers. (California Civ. Code, Sec. 1213; *Wayt v. Patee*, 205 Cal. 46.) (Recitals in the deed are superfluous.)

[2]Covenants against sales have been held void. This rule was established in *Los Angeles Investment Co. v. Gary* (1919), 181 Cal. 680, and was followed without variance until the decision in *Shelley v. Kramer*, 334 U. S. 1, with California courts upholding covenants against use and occupancy and refusing enforcement of agreements against sale.

[3]Under California procedure the refusal of its Supreme Court to hear a cause after decision by its District Court of Appeal indicates approval of the result reached but does not necessarily indicate concurrence in the grounds of the decision. (*People v. Davis*, 147 Cal. 346; *Burke v. Maze*, 10 Cal. App. 206.)

Argument.

Petitioners' assignment of errors is bottomed on the proposition that *Shelley* held that race restrictive covenants are "valid,"[4] and, they argue, that since such agreements are "valid" the State *must* afford a remedy in damages where non-Caucasian occupancy ensues as a result of a signer's sale of a restricted parcel. This unsophisticated concept slurs over the basic issue of whether State participation in the discriminatory scheme of the covenantors is forbidden by the command of the Fourteenth Amendment.

Plainly enough, Petitioners attempted to invoke state participation when they filed suit asking the state courts to assess and levy damages against Respondent. Judicial action is, of course, State action.

Virginia v. Rives, 100 U. S. 339, 347;
Shelley v. Kramer, 334 U. S. 1.

The precise impact of the Fourteenth Amendment lay in the fact that it "makes void 'State action of every kind' which is inconsistent with the guarantees therein contained and extends to manifestation of 'State authority in the shape of laws, customs, judicial or executive procedings.'"

Shelley v. Kramer, supra.

As this Court pointed out in *Shelley,* the landmark *Civil Rights Cases,* 109 U. S. 3, establish the proposition

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[4]This Court did not hold such agreements "valid" in those words. It did hold that "restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . . by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms . . . there has been no action by the States." (*Shelley v. Kramer, supra.*)

that any and every kind of State action taken to assist the individual in a racially discriminatory plan or scheme runs afoul of the Amendment.[5]

We do not understand Petitioners to contend that a State statute, city ordinance, or other enactment of a State or one of its subdivisions assessing damages against the signer of a race restrictive covenant, whose sale of such property eventuates in Negro occupancy, would escape constitutional condemnation. However Petitioners do contend that because the remedy they seek derives from a substantive rule of law fashioned from the complex of code provisions and decided cases their action is immune to constitutional attack. But:

> "It has been recognized that the action of state courts in enforcing substantive common law rules formulated by those courts may result in denial of rights guaranteed by the Fourteenth Amendment."
>
> *Shelley v. Kramer, supra,* p. 17.

A substantive rule of law, then, is no less, and no more, subject to constitutional scrutiny than legislative enactments or executive action.

Cf.:

American Federation of Labor v. Swing, 312 U. S. 321;

Shelley v. Kramer, supra.

---

[5]This Court noted that the *Civil Rights Cases* contained no less than eighteen phrases condemnatory of state participation—either legislaive, executive, or judicial—in discriminatory action. It must be kept in mind that the *Civil Rights Cases* do *not* hold that the Amendment confers on the individual any right to discriminate. They simply hold that so long as the individual engages in discriminatory conduct *without* the aid of the state his conduct is not wrongful under the Amendment. The state may prohibit such conduct; it may not assist it.

The fact that participation of State courts is sought to enforce the terms of a private agreement does not aid Petitioners.

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of State power in all forms."
>
> *Shelley v. Kramer, supra.*

The California courts found as a fact that the purpose of the covenant drawn in issue here was discriminatory. The District Court of Appeal thus epitomizes this aspect of the matter:

> "Racial discrimination is inherent in the covenant; its purpose and impact is to prevent the use or occupancy of real property by non-Caucasians, to segregate non-Caucasions 'simply that and nothing more.' The basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity." [R. p. 53.]
>
> *Barrows v. Jackson,* 112 A. C. A. 613.

The question of whether or not the State may lend its aid to residential segregation is not new to this Court. That issue was decided thirty-five years ago in *Buchanan v. Warley,* 245 U. S. 60.

The City of Louisville enacted an ordinance prescribing racial residential segregation. Buchanan, a white man agreed to sell a parcel of the interdicted property to Warley, a Negro. Warley breached his agreement and, when sued, pleaded the ordinance by way of justification for his

breach. He prevailed in the State courts. On writ of error to this Court, Buchanan attacked the constitutionality of the ordinance insofar as it denied his right to sell to a Negro. There, as is the case with Petitioners here, the objection:

> "is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons and plaintiff in error is a white person."
>
> *Buchanan v. Warley, supra,* p. 72.

This Court looked through *form* and saw that the *effect* of sustaining Warley's defense would be to prevent the use and occupancy of real property by Negroes—the same end envisaged here as epitomized by the District Court of Appeal. There the command of the ordinance was absolute prohibition; here the attempt is made to prevent Negro occupancy by the imposition of penalties in the guise of damages on those whose sales result in Negro occupancy.

In *Buchanan* this Court observed that:

> "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color."
>
> *Buchanan v. Warley, supra,* p. 81.

What Petitioners seek here is application of a substantive rule of law which, through imposition of damages, will annul the civil right of a white person to dispose of her property in such a manner that Negro occupancy may ensue. Conceivably, fear of imposition of damages might

effectively prevent all sales where Negro occupancy might ensue—the very end sought by Petitioners here, and in *Buchanan*. Nor can it be doubted

> ". . . . that among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment are the rights to acquire, enjoy, own and *dispose* of property." (Italics ours.)
>
> *Shelley v. Kramer, supra,* p. 10.

The short of the matter is that the State may not, through judicial, executive or legislative action, annul the civil right of any person to dispose of his property as he sees fit, and that is true whether the attempted annulment is by way of outright prohibition or through the imposition of penalties in the guise of damages.

At this posture of the case Petitioners interject the contention that Respondent is bound by her "contract" and that she "waived" her civil right to dispose of her property as she saw fit. Lawyers seeking to enforce agreements are fond of terming all writings to which their clients are parties "contracts" because the very term "contract" implies an agreement enforceable in a court of law.[6]

---

[6] "A contract is a promise or set of promises for breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty." (Restatement of the Law of Contracts, Sec. 1.) Weighed in these scales, and equated with the holding in *Shelley* it cannot be said that race restrictive agreements are "contracts" in the ordinary sense of the term. Of course, not every agreement is a "contract" in that sense. English courts withheld enforcement of agreements in restraint of trade, for example, although the agreements were "valid." Agreements not conforming to the Statute of Frauds are "valid" as are agreements against which the Statute of Limitations has run. Laches may bar enforcement of a valid agreement.

The need for this semantic exercise is greater in this case than in the ordinary action because here Petitioners hope, by use of the term, to encase their claim for damages in armor that will render it impervious to constitutional attack. What eludes Petitioners here is the legal consequences that flow from the signing of restrictive agreements, racial or building, under California law. California has long and consistently held that such agreements create ". . . equitable easements or servitudes for the benefit of the lots of co-owners."

Young v. Cramer, 38 Cal. App. 2d 64, 69.

This doctrine of equitable servitudes has been affirmed and reaffirmed in a long line of cases, involving both building and racial restrictions.

Werner v. Graham, 181 Cal. 874;
Martin v. Holm, 197 Cal. 733;
Vesper v. Forest Lawn, 20 Cal. App. 2d 157;
Wing v. Forest Lawn, 15 Cal. 2d 472;
Wayt v. Patee, 205 Cal. 46.

Once the servitude was created the California courts, applying substantive rules of law, charged the conscience of the violator with observance of the servitude and either enjoined further violation or held him answerable in damages. Either remedy was available at the option of the complainant.

After *Shelley* the California courts declined to lend further aid in enforcement of race restrictive covenants, holding correctly that the full impact of this Court's de-

cision fell on the substantive rule of law under which they had previously charged the conscience of the violator with observance of the terms of the agreement. (*Cummings v. Hokr*, 31 Cal. 2d 844.) In this case the variant is that aid of the California courts was sought through a levy of damages rather than through injunctive relief. Again they declined, correctly, to apply the substantive rule of law to effectuate the discriminatory purpose of the covenantors. The District Court of Appeal phrased its declination in these words:

> "The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of the use or occupancy of the property by non-Caucasians—it is no longer a matter of individual action: it is one of State participation in the maintenance of racial residential segregation." [R. p. 53.]
>
> *Barrows v. Jackson, supra.*

Petitioners are as free in California as they ever were to enter into race restrictive agreements and to voluntarily adhere to them. There is nothing in the decision of which Petitioners complain that narrows that right in any particular. The fact that they are free to observe the terms of their agreement does not entitle them to demand State action to accomplish their discriminatory purposes. Parties cannot, by stipulation or agreement, confer on any court jurisdiction to exceed its constitutional powers.

Conclusion.

It is true as Petitioners set forth that there is an even division of the highest courts of the various states on the question involved here. California and Michigan have ruled adversely to Petitioners' claim; Oklahoma and Missouri have upheld the right of their courts to entertain damage actions of this kind. A trial court in the District of Columbia dismissed such an action on the authority of *Shelley*. Respondent agrees that the issue needs clarification but because the question presented has been so completely disposed of by prior decisions we respectfully urge that this Court grant certiorari and affirm the decision of the Court below without further briefs or argument.

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IN THE

Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF FOR RESPONDENT.

Jurisdictional Statement.

This case is here on certiorari to the District Court of Appeal, Second Appellate District, State of California. Jurisdiction of this Court was invoked under 28 U. S. C. A. 1257(3) and Rule 38, 5(a) of this Court.

The Issue Involved.

This is another attempt to induce this court to hold that the Constitution sanctions exertion of state power to enforce racial residential segregation. Ordinances designed to accomplish that end—sometimes through attempts to restrict ownership of urban land[1] on the basis

[1] *Buchanan v. Warley*, 245 U. S. 60. The Louisville, Kentucky, ordinance drawn in question there interdicted Negro occupancy in certain sections of the city and, conversely, forbade white occupancy in others. The effect was to limit ownership

of race, and at others to limit occupancy rights of Negroes at the whim of neighbors—were held unconstitutional thirty-five years ago. Five years ago state courts were denied the right to use their process to restrain ownership or occupancy of real property by Negroes.[3]

The variant here is that the objective of residential segregation is sought to be achieved through a levy of damages against the signer of a race restrictive covenant whose property is ultimately occupied by a Negro after the agreement was signed and *after* sale by the signer. Petitioners carefully avoid any mention here of their segregatory purpose but the agreement they signed is eloquent of their intentions.[3a] They were not so reticent in briefs filed in the state courts. There they complained that they:

> ". . . are obliged to anticipate the influx into their neighborhood of genuinely unwholesome factors."

They foresaw all manner of evil if their claim for damages were denied. A decision adverse to them, they said, would lead:

> ". . . . first, to use and occupancy of other real property by non-Caucasians, and second, to the reprehensible tactics of unscrupulous real estate dealers who canvass a neighborhood afflicted by the breach of promise against use and occupancy and harass

---

[2] *Harmon v. Tyler*, 273 U. S. 668. A New Orleans ordinance forbade Negro occupancy in "white" blocks and white occupancy in "Negro" blocks without the consent of the majority of residents. See, also: *Richmond v. Dean*, 281 U. S. 704.

[3] *Shelley v. Kraemer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24. As we shall show later the race restrictive covenants drawn in question in those cases were similar in form and identical in aim with the agreement that bottoms this action.

[3a] The agreement proscribed occupancy by all but persons "wholly of the white or Caucasian race" [R. p. 3].

and intimidate and alarm the residents in an intensive drive for listings, and third, to the appearance upon the streets of the afflicted neighborhood of an unusual number of strangers of a demeanor and countenance such as to cause concern for the safety of the wives and daughters of the residents, and, fourth, to the anxiety of parents that their children will grow up to marry, or worse, with a neighbor playmate of a different race. These four unwholesome factors and others do not consist in any part of sale to non-Caucasians and all are traceable only to use and occupancy by non-Caucasians."

Seldom has the case for racial residential segregation been put in more direct, or more emotional, terms. The purpose of a contract like "The purpose of a rule of law must be found in its natural operation and effect."[4]

Statement of Facts.

There are three Petitioners here.

All of them are home owners in a Los Angeles residential tract.

Two of them—Barrows and O'Gara—and Respondent, who was then a home owner in the tract, signed a race restrictive agreement on October 21, 1944.

One of them—Pikaar—was *not* a signer of the agreement, but is a successor in interest of another signer.

The agreement was properly recorded[5] on May 5, 1945.

Respondent sold her home on February 2, 1950, but did not include the proscriptive racial clause in her deed as she had promised in the 1944 agreement.

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[4]Holmes, J., dissenting in *Bailey v. Alabama*, 219 U. S. 219.

[5]Such agreements may be recorded in California. *Wayt v. Patee*, 205 Cal. 46.

Respondent vacated her home on September 3, 1950. *After* she had moved out, and seven months *after* she had sold the home the non-conforming occupancy began.

Petitioners make no claim here that Respondent was the efficient cause of that non-conforming occupancy.[5a] They construe the 1944 document as an agreement in the nature of an insurance contract and rest their charge of breach on the fact that Negro occupancy occurred *after* the signing of the agreement.

The agreement is not pleaded *in haec verba*, nor is it attached to the complaint but Petitioners plead that:

> "by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators and assigns by a continuing covenant that no part of his said real property should ever at any time be used or occupied by any person not wholly of the white or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots. . . . That said Agreement was agreed to be a covenant running with the land. That each provision was for the benefit for all the lots therein described" [R. p. 3].

Petitioners' claim for damages is predicated on two grounds:

1. Respondent's failure to incorporate the proscriptive racial clause in her deed of February 2, 1950.

2. The occurrence, *per se*, of Negro occupancy *after* Respondent had signed the 1944 agreement.

[5a] That claim is asserted in the complaint but has been abandoned for reasons that will be pointed out later.

Questions Presented.

Although Petitioners' arguments are diffuse and difficult to isolate it is fairly apparent that their claims of error in the court below rest on the following propositions:

1. The claim that the refusal of the state courts to entertain the suit and the consequent failure to enforce the agreement through a levy of damages against Respondent impaired the obligation of a contract—the contract referred to being the 1944 agreement.

2. The claim that the California court erred in permitting Respondent to assert by way of defense that since a levy of damages would eventuate in exertion of state power to enforce racial residential segregation, in contravention of the command of the Fourteenth Amendment, state courts could not enforce the claim for damages for an alleged breach of a race restrictive agreement.

3. The claim that Petitioners were denied due process of law through the refusal of the California courts to enforce their claim for damages for an alleged breach of the 1944 agreement.

4. The claim that Petitioners were denied equal protection of the law because they were denied the right, accorded other persons, of enforcement by securing damages for breach of a "contract."

We consider these claims in that order.[5b]

[5b] We also assert another ground which, we believe, will sustain Respondent's position. That claim is urged in Point 5.

Summary of Argument.

1. The action of the state court in refusing to enforce a claim for damages against the signer of a 1944 race restrictive agreement, where Negro occupancy eventuated after her sale of the restricted property, does not impair the obligation of a contract in violation of Article I, Section 10, of the Constitution. California has not changed its law in respect of such agreements, as it existed in 1944, except to the extent that it has assimilated the rule in *Shelley v. Kraemer*, 334 U. S. 1, and no longer tolerates judicial enforcement of race restrictive agreements.

2. The state court was correct in holding that the action of Petitioners seeks to nullify the decision of this court in *Shelley v. Kraemer, supra,* in that they seek to use state judicial machinery to enforce an agreement which would exclude non-Caucasians from occupying real property. In the *Shelley* case the signers of the agreement sought injunctive relief and in this case, damages, but in both cases the end-purpose is to use the enforcement powers of the state to deprive non-Caucasians of their right to occupy real property. Under those circumstances the state court was powerless to aid Petitioners.

3. Petitioners were not denied due process of law through being denied access to the state courts to enforce their claim for damages. The Fourteenth Amendment deprives them of the use of the courts when their purpose is the enforcement of a discriminatory agreement.

4. Petitioners were not denied equal protection of the law in being denied access to the courts to enforce race restrictive agreements since the Constitution confers on no individual the right to demand action that will result in denial of equal protection of the law to other individuals (*Shelley v. Kraemer, supra*) and it is plain the power of the state to make and enforce property rights must be exercised within the boundaries of the Fourteenth Amendment (*Marsh v. Alabama*, 326 U. S. 501).

5. Enforcement of the claim for damages against Respondent signer of a race restrictive agreement where non-conforming occupancy eventuated after her sale of the property would deny Respondent due process of law (*Buchanan v. Warley*, 245 U. S. 60).

6. Failure of Respondent to include the terms of proscriptive racial agreement in her deed of sale, given seven months before non-conforming occupancy began, gave rise to no cause of action since the recorded restrictive agreement gave notice to all future purchasers (Cal. Civ. Code, Sec. 1213; *Wayt v. Patee*, 205 Cal. 46). In any event the failure is *de minimis*.

7. This case is governed by the Fourteenth Amendment and there is no need here to invoke considerations of public policy or the consequences flowing from our adherence to the Charter of the United Nations.

ARGUMENT.

1. The Impairment of Contract Claim.

Petitioners do not claim, as indeed they cannot, that any legislative enactment is involved here. California does not have, and never has had, a statute defining the rights, duties and obligations that accrue to signers of agreements restricting land use or occupancy on the basis of race. California does have a substantial body of substantive law bearing on those issues. That law was developed between 1919 and the decision in *Shelley v. Kraemer*, 334 U. S. 1, in 1948. A goodly portion of it was analogized from the contemporary and ever developing law respecting building restrictions.

The following rules of substantive law encompass the field:

1. Agreements restraining *sale* of land to members of defined racial groups were *unenforcible* because they contravened the state's statutory rule and public policy against restraints on alienation.

Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152;

Wayt v. Patee, 205 Cal. 46.

2. Agreements restraining *use and occupancy* of land by members of defined racial groups were *enforcible* and it made no difference whether the restraint on use and occupancy was imposed by deed or through neighborhood agreement.

L. A. Investment Co. v. Gary, 181 Cal. 681;

Wayt v. Patee, supra.

3. Agreements restraining use and occupancy were entitled to recordation under the state's recording statute and when so recorded imparted constructive notice to all future purchasers.

Wayt v. Patee, supra.

The doctrine of enforcibility of restraints on use and occupancy rested on the following propositions:

(a) The signing of an agreement by lot owners, or the imposition of a condition in a deed, forbidding use and occupancy by members of a defined racial group imposed an equitable servitude on the then owned lots.[6]

Werner v. Graham, 181 Cal. 874;

Martin v. Holm, 197 Cal. 773;

Wayt v. Patee, 205 Cal. 46;

Fairchild v. Raines, 24 Cal. 2d 818.

(b) The courts would charge the conscience of the signer, or his subsequent grantee, with observance of the agreement where such person had notice, actual or constructive, of the terms of the agreement and would enforce the agreement either by the command of specific performance or through a levy of dam-

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[6]In developing this rule of substantive law as to equitable servitudes, California followed the general trend of the law in this field. (See: 4 Pomeroy Equity Jurisprudence (Fifth Ed.) 845 *et seq.*; 33 Harvard Law Review 813; 10 So. Cal. Law Review 281; 16 Mich. Law Review 90.) In respect of the character of the burden imposed the law was the same in race restrictions as in building restrictions in California.

ages and it made no difference whether the covenant did, or did not, run with the land.

L. A. Investment Co. v. Gary, 181 Cal. 681;
Littlejohn v. Henderson, 111 Cal. App. 115;
Alderson v. Cutting, 163 Cal. 503;
Burkhardt v. Lofton, 63 Cal. App. 2d 230.

(c) The right to enforcement, either to compel observance or force a response in damage accrued to lot owners—both original signers and their successors in interest as against subsequent violators,[6a]

Littlejohn v. Henderson, supra;
Wayt v. Patee, supra.

(d) Even where a valid restraint on use and occupancy subsisted the courts might refuse enforcement upon considerations of public policy or because of changes in or surrounding the bound lots.

Letteau v. Ellis, 122 Cal. App. 584;
Fairchild v. Raines, 24 Cal. App. 2d 818;
Friesen v. Glendale, 209 Cal. 524.

(e) No cause of action arose as against a seller of race restricted property for *sale* of that property to a member of the proscribed class.

Stratton v. Cornelius, 99 Cal. App. 8.

This was the law as enforced by the California courts in 1944 when the agreement in question was drafted and

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[6a] Petitioner Pikaar, a nonsigner and a successor in interest of a signer, seeks to avail himself of this rule of law. Otherwise he is an improper party.

signed by Petitioners and Respondent. It continued to be the law of the state until this court decided the *Shelley* case in 1948. Thereafter the California courts assimilated the ruling in the *Shelley* case to state law and consequently declined to use their process to enforce race restrictive covenants through application of law that had theretofore been considered applicable.

Cummings v. Hokr, 31 Cal. 2d 844.

Petitioners pleaded in their complaint that Respondent "moved out of the house . . . in order to permit" non-Caucasian occupancy and that "in violation of said Agreement, has permitted persons not wholly of the white or Caucasian race to occupy" her lot [R. p. 4]. These averments would have been adequate prior to the *Shelley* case to have stated a cause of action against her. She could have been compelled to specifically perform by ousting her permitees or to have responded in damages, under the California cases just cited.[6b] The court below held that prior to the *Shelley* case a cause of action for damages as against Respondent would have been stated, not for the

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[6b]Petitioners admit in their brief (p. 28) that in any action against her for sale of the property "respondent could make the non-federal defense that her promise was void in California as a restraint on alienation." It is also apparent that since the occupancy complained of took place after sale and after Respondent had parted with power to control occupancy she could not "permit" non-Caucasian occupancy. No cause of action arose in California by reason of sale to non-Caucasians who might be expected to occupy the home they had purchased. (*Stratton v. Cornelius,* 99 Cal. App. 8.) Thus, on closer examination, Petitioners have been forced to abandon the averment of "permitting" and are thrown back on the theory that the agreement is in the nature of a contract of insurance. They now claim that occurrence of occupancy, *per se,* imports liability. This is not an action for breach attendant on the sale but for a breach flowing from occupancy of the premises by non-Caucasians after the completed sale.

sale but because of her alleged "permitting" the Negro occupancy.

However, Petitioners' contention that California courts have impaired the obligation of a contract is untenable. The insuperable barrier to enforcement in this case is not the whim or caprice of the California courts but the holding of this Court in the *Shelley* case. Parenthetically, we do not know of any constitutional impediment to a change of decisions by state courts where, as here, no statute is drawn into question or construed. Had the state court held that enforcement of race restrictive covenants worked a restraint on alienation or was contrary to state public policy, in direct contradiction to prior rulings, no impairment of the obligation of a contract in a constitutional sense would have resulted.

Cf:

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50;

Sauer v. New York, 206 U. S. 536.

In any event, the court below laid aside all questions of state law and posited its decision squarely on the *Shelley* case. There this court held that:

> "We conclude, therefore that the restrictive standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment."
>
> *Shelley v. Kraemer, supra,* p. 13.

That had been the law of California prior to the *Shelley* case and the court below did not disturb that concept or change, or alter, it in any respect. That is still the law of California.

In rejecting arguments made in the *Shelley* case that race restrictive agreements were void this Court held that:

> "So long as the purposes of these agreements are effectuated by voluntary adherence to their terms it would appear that there has been no action by the State and the provisions of the Amendment have not been violated."
>
> *Shelley v. Kraemer, supra,* p. 13.

The court below did not narrow that right of voluntary adherence to the terms of this or any other race restrictive agreement in any particular. Petitioners are as free as they ever were to enter into, and observe, or *voluntarily adhere* to the terms of any race restrictive agreement they can devise.

In summary, the California court, looking through form and at substance, came to the conclusion that the end sought in this action was *enforcement* of race restrictive agreements. It was clear to that court that:

> "Racial discrimination is inherent in the covenant; its purpose and impact is to prevent use or occupancy of real property by non-Caucasians, to segregate non-Caucasians 'simply that and nothing more.' The basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity" [R. p. 53].

Having decided that question to its own satisfaction it simply declined to exert its power, which is state power, to effectuate the end. Its declination to do in 1952 what it might have done in 1944, was not due to any notion of its own as to state law but in response to the decision of this court in the *Shelley* case in correcting the erroneous concept of state action which the California courts had

entertained since 1919. There is no impairment of the obligation of a contract in such a situation.

The short of the matter is that Petitioners drafted and signed the 1944 agreement[6c] in what proved to be the vain belief that constitutional interpretation of their enforcement rights would remain static. The enforcement of what they choose to call the "contract" has been foreclosed, not by the California courts, but by the command of the Fourteenth Amendment.

2. The Effect of Enforcement.

Petitioners next argue that even if it is true that the end envisaged by the court below to the effect that an award of damages would eventuate in enforcement of the race restrictive agreement and would thus effectively deny members of the proscribed group "equality in enjoyment of property rights" and "prevent use and occupancy of real property by non-Caucasians . . . segregate non-Caucasians," through exertion of state power, Respondent cannot avail herself of those facts as a defense in this action for damages. This is only another way of saying that although this agreement cannot be enforced by state courts by a decree in specific performance it can be enforced by the same courts in a damage action.[7]

[6c] Again we wish to point out that Petitioner Pikaar was not a signer of the 1944 agreement. As to him and Respondent there was no privity. His presence here as a complainant underscores the proposition that enforcement rights under these agreements accrued through operation of substantive rules of law devised to effectuate the ends sought by covenantors and do not rest on ordinary rules governing contractual duties as such.

[7] Of course an award of damages for breach of a contract is only a method of enforcing a contract. (See: Restatement, Vol. I, Secs. 13, 14, 178, 225, 327; Vol. II, Secs. 598, 609. See also, *Oakland Car Co. v. Indiana Motors*, 201 Fed. 499.)

Petitioners' citation of authorities holding that constitutional guarantees accrue to the advantage of individuals before the court are correct, but not relevant here. They mistake the rationale of the decision of the California court. As we have pointed out the court below found that "racial discrimination is inherent in the covenant; its purpose and impact is to prevent use or occupancy of real property by non-Caucasians, to segregate non-Caucasians . . . the basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity" [R. p. 53].

Having arrived at that very obvious and, it seems to us, incontrovertible conclusion the court below was faced with the question of whether or not it could exert its power—the power of the state—to enforce the "racial discrimination inherent in the covenant" [R. p. 53]. Its position at that posture of the case was the same as that of any court called upon to enforce an agreement contrary to good morals, or public policy, or contrary to express statutory or constitutional command.[7a] California courts have always declined to act under such circumstances, leaving the parties where they found them.

Takeuchi v. Schmuck, 206 Cal. 782, 276 Pac. 345;
Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673.

Cf.:

Sage v. Hume, 235 U. S. 99.

[7a] The Fourteenth Amendment is an express command in these circumstances.

"The majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination."

Fay v. New York, 332 U. S. 261, 282.

The purpose of the courts in refusing to act in such circumstances is not to punish the individuals before them but to uphold the policy of the law.

Orlinoff v. Campbell, 91 Cal. App. 2d 382, 205 P. 2d 67.

Cf.:

Continental Paper Co. v. St. Louis Vaight, 212 U. S. 227.

California courts, trial or appellate, assert the power to decline intervention to enforce such contracts on their own motion and without regard to the pleadings of the parties, under those circumstances.

Fewell v. Pratt, 17 Cal. 2d 85.

The command against exertion of state power to enforce racial residential segregation—the end found inherent in any award of damages by the court below—flows from a higher source than the state constitution or laws, or California's public policy. It comes from the Constitution itself, as demonstrated by this court in the *Shelley* case. Plainly, the court below was compelled to measure its powers and duties by the terms of that decision. Its discussion of the consequences that would have flowed from enforcement of the agreement drawn in question here and its repeated emphasis on the civil rights of non-Caucasians were not advanced by the court below to justify the decision on the ground that constitutional rights of non-parties to the litigation, *as such,* would be affected but rather to demonstrate the reasons *why* it was compelled to leave the parties where it found them. It also considered the application of the *Civil Rights Cases,* 109 U. S. 3, with their recurrent reiteration of the

proposition that the Fourteenth Amendment "makes void state action of every kind" indulged in to aid individual invasions of civil rights. Out of these considerations the court below held correctly that:

> "The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of use or occupancy of the property by non-caucasians—it is no longer a matter of individual action; it is one of state participation in the maintenance of racial residential segregation." [R. p. 53.]

Petitioners' only answer to this conclusion is to repeat endlessly that they were signatories, with Respondent, to a "contract" and that the *Shelley* case held such "contracts" to be "valid." These assertions are only semantic exercises. This court did not talk about "contracts" in the *Shelley* case.[8] It talked about "agreements."

The very word "contract" imports enforcibility[9] and not every writing is a "contract" in that sense. When agreements of the kind drawn in question here are equated with the holding in the *Shelley* case—to the effect that they are unenforcible—they are not "contracts" in the technical sense. There are many agreements, not void as between the parties and susceptible of voluntary compliance, that will not be enforced by the courts, whether be-

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[8]The phrase "agreements" appears some 18 times in the court's discussion. The word "contract" is used only twice and then in a particular context.

[9]"A contract is a promise or set of promises for breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty." (Restatement of Law of Contracts, Vol. I, Sec. 1.)

cause of statutory interdiction or because of substantive rules of law. For example, California courts will not enforce an agreement outside the Statute of Frauds, or one barred by the Statute of Limitations, or where laches is shown. We have pointed out that agreements of the kind under consideration were denied enforcement by California courts, *even where valid,* because of change of conditions or for reasons of public policy. Validity alone was never the test of whether a restrictive agreement would be enforced.

Moreover, this court did *not* hold such agreements "valid," in the narrow technical sense, in the *Shelley* case.[10] It did not even use that word to describe them or their attributes. It said simply and with finality that "so long as the purposes of these agreements are effectuated by voluntary adherence to their terms it would appear that there has been no action by the State and the provisions of the Amendment have not been violated." It reiterated that view in *Hurd v. Hodge, supra,* saying of the applicable federal law, "the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms."

The right of the parties to voluntary adherence is not questioned here. However, the concept of voluntary adherence is a far cry from that of the technical attributes Petitioners would read into the terms "valid" as used in the law of contracts.

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[10]The California District Court of Appeal did use the term "valid" but it is apparent from a reading of its decision that it did not use the term in any narrow technical sense. It meant only that the agreements were not void. The phrase used is "constitutionally" valid.

3. Petitioners' Claim of Denial of Due Process of Law.

Petitioners next move to their claim that they have been denied due process of law through refusal of the California courts to entertain their action for damages. Apparently that claim is posited on the contention that the liberty of contract has been effectively denied them because they have been denied their claim for enforcement of the 1944 agreement. We have no quarrel with the generalization that liberty of contract is one of the rights protected by the Constitution. It is equally well settled that:

> "There is no such thing as absolute freedom of contract . . . . the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons."
>
> *Atlantic Coast Line v. Riverside Mills,* 219 U. S. 186, 202.

"General propositions do not govern concrete cases"[10a] and the situation here is not illuminated by reiteration of the truism that enforcement is the ordinary consequence attendant on signing of agreements. What is involved here is a concrete kind of an agreement, out of which particular relationships arise. While "all rights tend to declare themselves absolute to their logical extreme"[11] the fact is that the "right" involved here is not absolute as shown by the ruling in the *Shelley* case. This court *did* foreclose enforcement of agreements of the kind under consideration here in that very case. It denied to signers

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[10a]Holmes, J., dissenting in *Lochner v. New York,* 178 U. S. 45.

[11]*Hudson Water Co. v. McCarter,* 209 U. S. 349, 355.

of race restrictive agreements the right to secure enforcement through specific performance and there, as here, there was vigorous argument that denial of the remedy would rob such agreements of vitality and effect. There is no more reason why the remedy of enforcement through damage actions should be preserved than there is for the preservation of the remedy of specific performance. Both are methods of enforcement. Both affront constitutional guarantees. Denial of the former no more denies due process than denial of the latter. As the court below phrased it:

> "The denial of access to the courts does not deprive plaintiffs (Petitioners) of their property without due process of law. The Constitution itself deprives them of the use of the courts when their purpose is in the enforcement of their discriminatory covenant." [R. p. 55.]

The right to enforcement does not accrue simply because parties have signed an agreement:

> "And more broadly it has long been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of successful suit."
>
> *Sage v. Hume,* 235 U. S. 99, 105.

The agreements they sign must be assessed in the light of the result they seek and when those results collide with constitutional commands the courts must decline enforcement.

4. Petitioners' Claimed Denial of Equal Protection of the Law.

Petitioners' claim that denial of access to the courts to enforce the terms of their agreement denies them equal protection of law is insubstantial. The short, and complete, answer is afforded by the *Shelley* case:

> "Nor do we find merit in the suggestion that persons who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property rights must be exercised within the boundaries defined by the Fourteenth Amendment.. Cf. Marsh v. Alabama, 326 U. S. 501."
>
> *Shelley v. Kraemer, supra,* p. 22.

Here again the applicability of the language just quoted turns on the finding of the court below that the purpose of the agreements was discriminatory and that their enforcement through the levy of damages would result in exertion of State power to effectuate the discriminatory purpose. That being so, there is no more of denial of equal protection where access to the courts is denied in a suit for damages than there is in an action for specific performance.

5. Enforcement of the Agreement Would Deny Respondent Due Process of Law.

There is an additional ground, not relied upon by the court below but urged by Respondent at every stage of the proceeding, that bars Petitioners' claim for enforcement [R. pp. 8, 32].

There can be no doubt since the *Shelley* case that judicial action in enforcing substantive common law rules is state action as that term is used in a constitutional sense.

> "It has been recognized that the action of State courts in enforcing substantive common law rules formulated by those courts may result in denial of rights guaranteed by the Fourteenth Amendment."
>
> *Shelley v. Kraemer, supra,* p. 17.

We do not understand Petitioners to contend that a statute, ordinance or other legislative enactment of a state, or one of its subdivisions, imposing a fine on the signer of a race restrictive agreement or prescribing damages, in the case where Negro occupancy eventuated after the signing of the agreement, would escape constitutional condemnation. Nor would the result depend upon whether the accused had, or had not, signed the agreement. It would be clear in such a situation that the State had exerted its power to enforce racial residential segregation through this attenuated device. The denial of due process would be apparent whether the fine, or the award of damages, took the entire proceeds of sale or only part of it.

A substantive rule of law is no less, and no more, subject to legislative scrutiny than a legislative enactment.

Shelley v. Kraemer, supra, p. 14;

American Federation of Labor v. Swing, 312 U. S. 321.

The fact that State participation is invoked to enforce the terms of a private agreement is not significant in this context.

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertion of state power in all forms."
>
> *Shelley v. Kraemer, supra,* p. 20.

The ultimate effect of enforcement is the same where breach of contract is claimed, whether that enforcement is secured through levy of damages in a civil action or by a fine in a criminal action.

> "Any legal liability for the breach of a contract is a disagreeable consequence which makes the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine."
>
> *Bailey v. Alabama,* 219 U. S. 219, 246 (Holmes, J., dissenting).

The proposition that exertion of State power to clog the sale of real property for racial considerations denies due process of law was originally decided by this Court in *Buchanan v. Warley,* 245 U. S. 60.

A Louisville ordinance prescribed racial residential segregation through the device of forbidding occupancy of certain real property by Negroes. Buchanan, a white person, agreed to sell a parcel of interdicted property to Warley, a Negro. Warley breached the contract and pleaded the ordinance by way of defense, on the ground that his agreement of purchase required consummation

only if he was free to occupy the parcel. He prevailed in the State Court (*Buchanan v. Warley,* 165 Ky. 559).

On writ of error to this Court, Buchanan attacked the constitutionality of the ordinance on the ground that it nullified his civil right to dispose of his property as he saw fit. There, as in the comparable situation here, the objection:

> ". . . is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves the rights of colored persons and plaintiff in error is a white person."
>
> *Buchanan v. Warley, supra.*

This Court in the *Buchanan* case, as was the case with the court below, assessed the situation and saw readily enough that what was on the surface a mere breach of contract action was, in reality, an attempt to secure constitutional sanction for exertion of State power to enforce racial residential segregation. In the *Buchanan* case the command of the ordinance against Negro occupancy, and ownership of which occupancy is a mere incident, was absolute. Here the attempt to forestall Negro occupancy, as an incident of ownership, is sought to be achieved through a levy of damages against the owner whose sale eventuates in such occupancy but it is plain that the imposition of damages on the seller is designed to achieve the absolute of preventing the unwanted occupancy. The avowed end of the Louisville ordinance was to prevent occupancy of certain property by Negroes; the avowed end of the 1944 agreement in this case is to prevent occupancy of certain property by non-Caucasians. In the *Buchanan* case the ordinance was drawn into issue through an attempt to penalize the seller by annulling his

sale; in this case the 1944 agreement is drawn into issue through an attempt to penalize Respondent through a levy of damages that will annul the sale by taking away the monetary advantage that may have accrued.

This Court epitomized the issue in the *Buchanan* case with the holding that:

> "The right which this ordinance annulled was the civil right of a white man to *dispose* of his property if he saw fit to do so to a person of color." (Italics added.)
>
> *Buchanan v. Warley, supra*, p. 81.

This dispositive right as a civil right was reaffirmed and emphasized in the *Shelley* case:

> ". . . . among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment are the rights to acquire, enjoy, own and *dispose* of property." (Italics added.)
>
> *Shelley v. Kraemer, supra*, p. 10.

What Petitioners seek here is enforcement of a rule of law which will annul the civil right of Respondent to dispose of her property as she sees fit.[12] There is here the same issue abstracted by this Court from the *Buchanan* case and the *Harmon* case:

> "The precise question before this Court in both the Buchanan and Harmon cases involved the right of

[12]Under Petitioner's theory that non-conforming occupancy, *per se*, attaches liability to the signer of a race restrictive agreement the limitation on her right to sell is severe. Such liability might attach long after her disposal of the property and whenever the non-conforming occupancy began. Plainly the precise purpose of the suit to enforce the contract through a damage action is to annul the right to dispose of her property as Respondent sees fit. That is what Petitioners want. That is why they are here.

white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color."

Shelley v. Kraemer, supra, p. 12.

That is the precise question here. In truth, the issues confronting the Court in the *Buchanan* case and those presented in this one are reverse sides of the same coin. In the former the State Court was enjoined by the ordinance to penalize the seller by nullifying his contract of sale; in this case the State Court is urged to penalize the seller by, in effect, nullifying his sale through taking the increment of the sale by way of a levy of damages. The aim is to impose "restrictions as to potential purchasers' nonracial considerations" in both instances. The command in the former case is statutory; in the latter the State Court is asked to reach the identical end through the self-discipline of a substantive rule of law.

It is at this posture of the case that Petitioners interpose the contention that Respondent as a signer of the 1944 agreement is bound by it and does not stand before the Court on the same terms as the "willing sellers" in the *Buchanan* case or the *Shelley* case. The vice of this argument is the tacit assumption that the civil right to "acquire, enjoy, own and dispose" without restrictions as to race or color of real property is a mere contract right or property right which the State may curtail or regulate. If that were so then the ordinance in the *Buchanan* case could have been justified" under the authority of the State in the exercise of police power."[13] But there this Court held with finality:

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts.

[13] *Buchanan v. Warley, supra,* p. 81.

> Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."
>
> *Buchanan v. Warley, supra,* p. 81.

It is clear, then, that the command of the Fourteenth Amendment is addressed to the State and that the purport of that command is that the State cannot annul the civil right of free disposal of property, on considerations of race or color through the exercise of its police power. The *Shelley* case holds that the power thus denied to the State in the exercise of its police power cannot be conferred on it by inducing it to enforce a private agreement. On the one hand the State undoubtedly has an interest in enforcing private agreements; on the other the Amendment stays its hand where exertion of its power would annul this civil right. Thus *whenever* the Respondent assumed the status of a "willing seller," as she did in this case, the State could not use its process to abort the sale she proposed to make. The taking of her property, through an award of damages, would constitute a denial of due process of law as to her. To return to our earlier example, there would be no difference in a constitutional sense whether the State sought to abort such a sale through law or ordinance, imposing a fine or assessing damages against the signer of a race restrictive agreement for a sale which eventuates in Negro occupancy, or whether it reached the same end through application of a substantive rule of law making that signer liable in damages to other signers. Petitioners and Respondent were, and are, free to enter into the discriminatory agreement, and to observe it, but they cannot confer on the State Court jurisdiction to exert its power to enforce that

agreement. The Fourteenth Amendment forbids what they propose.[14]

Petitioners suggest finally that the sale to the non-Caucasian had been made in this case and that hence no levy of damages could assist their discriminatory intent to invoke exertion of state power to enforce racial residential segregation. That unsophisticated concept slurs reality. "Every opinion tends to become a law,"[15] Justice Holmes admonished us a long time ago. That admonition has greater significance in this case than it may have in other litigation. Judges and lawyers do not need to be told that the end-purpose of a suit of this kind—chosen, Petitioners said in briefs filed in the state courts, as a test case—is to create precedential substantive law that will have conse-

---

[14]Implicit in Petitioner's argument on this phase of the matter is the theory made explicit in the brief of St. Louis *Amicus*, that private individuals have a constitutionally protected "right" to discriminate on the basis of race or color. St. Louis *Amicus* epitomizes that view on page 12 when reference is made to "private discrimination protected by the Civil Rights Cases . . ." The *Civil Rights Cases* did not impute that meaning to the Fourteenth Amendment. What they did hold is that the Fourteenth Amendment did not impose prohibitions on individuals, as such, and that the State cannot be said to "sanction" or "support" discriminatory acts of individuals merely because it does not make them unlawful. Once however the State forsakes that passive role and lends its sanction or support "by some shield of State law or State authority" its action stands condemned by the Amendment. So here, the State may not sanction or support Petitioners in their effort to induce exertion of its power and that, not because of, or in spite of, Petitioner's morality, or lack of it, in not observing the agreement, but because of the restraint imposed on the State. On the other hand the State is entirely free to curb, or to prohibit "private discrimination" precisely because such discrimination is not "protected."

Fay v. New York, 332 U. S. 261.

[15]Holmes, J., dissenting in *Lochner v. New York*, 178 U. S. 45.

quences far beyond the outcome of this case.[16] The State has neither the duty nor the power to take Respondent's property, under the guise of an award of damages, to create the pattern of segregation.

Cases involving issues of this kind call into full play the century old declaration of this court that it must ever be kept in mind that "it is a constitution we are expounding"[17] and of the admonition in the *Shelley* case that:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation af those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with that fundamental purpose in mind."
>
> *Shelley v. Kraemer, supra,* p. 23.

The claimed right of Petitioners for blind judicial enforcement of what they, by a process or rationalization call "contract rights," must yield to *constitutional* implementation of the fundamental purpose of the Amendment.

---

[16]The filing of *amicus* briefs on behalf of widely scattered property owners' organizations, all interested in the preservation of racial residential segregation, would seem to indicate that these laymen do not regard this case as having a narrow compass.

[17]Marshall, C. J., in *Bank of U. S. v. Deveaux,* 5 Cranch 61.

6. Failure to Incorporate the Proscriptive Clause.

The court below believed that its view of the impropriety of granting Petitioners access to the courts to enforce their claim for damages obviated any necessity for considering the claim for damages against Respondent for her failure to include the proscriptive racial clause in her deed of February 1950. We agree but we would like to point out that her failure had no practical consequences. Petitioners plead that the agreement was recorded. Under California law recordation imparted constructive notice of its terms and subsequent purchasers were as tightly bound as if the clause had been inserted in the deed.[18] In any event the claim is a mere quibble under the rule of *de minimis*.

7. "Anticipated Defenses."

We have not dealt with or presented the so-called "anticipated defenses" referred to in Petitioners' brief of public policy or consequences flowing from adherence to the Charter of the United Nations. The Fourteenth Amendment governs this situation so clearly and completely that other arguments are surplusage. The thorough consideration given all aspects of this problem in the *Shelley* case is so recent that we have not felt it necessary to review sociological and statistical data presented there as to the gravity and importance of this issue.

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[18]California Civil Code, Sec. 1213; *Wayt v. Patee*, 205 Cal. 46. Recitals of this kind are surplusage.

Conclusion.

The constitutional considerations that compelled the result reached in the *Shelley* case, and related cases, require affirmance of the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

Stipulated Consent to File Brief as Amici Curiae and Brief of Amici Curiae.

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

STIPULATED CONSENT TO FILE BRIEF AS AMICI CURIAE.

It is hereby stipulated and agreed pursuant to Rule 27(9)(a) and (b) of the Revised Rules of the Supreme Court of the United States that the following named organizations may file their brief as *amici curiae* urging that the petition for a writ of certiorari filed in this Court by the above named petitioners be granted:

Marcus Avenue Improvement Ass'n,
West Walnut Manor Ass'n,
Northwest Business Men's Ass'n,
O'Fallon Park Protective Ass'n,
North St. Louis Business Men's Ass'n,
Northwest Improvement Ass'n,

North Point Improvement Ass'n,
Northwest Protective Ass'n,
Mark Twain Improvement Ass'n,
Chouteau-Lindell Improvement Ass'n,
Walnut Park Protective Ass'n,
Property Owners League of St. Louis.

Dated January 12, 1953.

Respectfully submitted,

JOHN C. MILES,
J. WALLACE MCKNIGHT, and
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By CHARLES LELAND BAGLEY,
Counsel for Petitioners,

LOREN MILLER,
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IN THE

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October Term, 1952

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

BRIEF OF AMICI CURIAE.

This brief is filed on behalf of the Members of the following organizations, *amici curiae*, pursuant to stipulated consent of all parties and Rule 27(9)(a) and (b) of the Revised Rules of the Supreme Court of the United States:

Marcus Avenue Improvement Ass'n,
West Walnut Manor Ass'n,
Northwest Business Men's Ass'n,
O'Fallon Park Protective Ass'n,
North St. Louis Business Men's Ass'n,
Northwest Improvement Ass'n,
North Point Improvement Ass'n,
Northwest Protective Ass'n,
Mark Twain Improvement Ass'n,
Chouteau-Lindell Improvement Ass'n,
Walnut Park Protective Ass'n,
Property Owners League of St. Louis,

Statement of Interest of Amici Curiae.

The *amici curiae* above listed are corporate organizations of home owners in the City of St. Louis, Missouri. Representing almost 100,000 citizens of the State of Missouri, residing in northwest St. Louis, the listed organizations were those most vitally concerned with and most seriously affected by the decision in *Shelley v. Kraemer*, 334 U. S. 1. Practically all of the homes of these citizens were subject to the contractual liens resulting from mutual agreements and promises freely and willingly entered into. Certificate of title to their properties still reflect the restrictive provisions of the contracts. Whether a sale to an excluded buyer constitutes a breach subjecting them to damages is a matter of utmost importance.

Reasons in Support of Review in the Above Case.

Persons, members of the above listed organizations, are in a state of hopeless confusion as to their rights and duties flowing from the existence and semi-effectiveness of "valid" contracts which are specifically unenforceable by injunction but which still may impose liability to civil damages if breached. Neither attorneys nor the Supreme Court of Missouri are able to determine the answers to the many questions left unanswered by this Court in the *Shelley* case, and unanswered by the several State courts considering the matter.

The Supreme Court of Missouri, in *Weiss v. Leaon*, 359 Mo. 1054, 225 S. W. 2d 127, expressed doubt as to the proper extension and application of the rulings in

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vs.

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Respondent.

BRIEF AMICI CURIAE.

This brief is filed on behalf of the members of the following organizations, *amici curiae*, pursuant to stipulated consent of all parties and Rule 27(4)(a) and (b) of the Revised Rules of the Supreme Court of the United States:

Affiliated Neighbors.
Angeles Mesa Neighbors Association.
Annandale District Improvement Association.
Associated Neighbors.
Chesterfield Square Association.
Citizens United, Inc.

the *Shelley* case; and in the same case specifically held that the plaintiff's petition, grounded on allegations similar to those in the above case, stated a cause of action in damages for breach of contract.

Such uncertainty in a matter so vital as a contract involving rights in one's own property should not be permitted to exist. Only a clear-cut determination, by the Supreme Court of the United States, of the questions presented in the above case can bring certainty where uncertainty now exists and bring an end to useless and repetitious litigation in State Courts.

These *amici curiae* respectfully pray the Supreme Court of the United States to grant the petition for certiorari sought to issue to the District Court of Appeal of the State of California, Second Appellate District.

Dated January 12, 1953.

Respectfully submitted,

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By G. L. SEEGERS,

Attorneys for Amici Curiae.

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Petitioners,

vs.

LEOLA JACKSON,
Respondent.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

Stipulated Consent to File Brief as Amici Curiae

It is hereby stipulated and agreed pursuant to Rule 27(9)(a) and (b) of the Revised Rules of the Supreme Court of the United States that the following named organizations may file their brief as *amici curiae* urging that the petition for a writ of certiorari filed in this Court by the above named petitioners be granted:

Affiliated Neighbors.

Angeles Mesa Neighbors Association.

Annandale District Improvement Association.

Associated Neighbors.

Chesterfield Square Association.

Citizens United, Inc.

Cudahy Improvement Association.
Florence District Taxpayers Civic Association.
Hancock Park Neighbors, Inc.
Harvard Neighbors Association.
LaFayette Square Improvement Association.
Loyal Neighbors Association.
Nadeau District Property Owners Association.
Neighborhood Protective Association, Inc.
Neighborly Endeavor, Inc.
The Parks Community Association.
Steadfast Neighbors Committee.
United Homeowners, Inc.
United Neighbors, Inc.
Vermont Square Neighbors, Inc.

Los Angeles County, State of California.

Southwood Improvement Association, Inc.

South San Francisco, California.

Santa Fe Place Improvement Association.

Kansas City, Missouri.

Arkansas Avenue Community Association.
Brentwood Terrace Citizens Association.
Brightwood Citizens Association, Inc.
Brookland Citizens Association.
Burroughs Citizens Association.
Capital Hill South-east Citizens Association.

Cathedral Heights-Cleveland Park Citizens Association.
Citizens Association of Takoma Park, Inc.
Citizens Forum of Columbia Heights.
Citizens Protective Alliance, Inc.
Columbia Heights Citizens Association.
Congress Heights Citizens Association.
Michigan Park Citizens Association.
Minnesota Avenue-River Terrace Citizens Association.
National Gateway Citizens Association.
North Capitol Citizens Association.
North Cleveland Park Citizens Association.
North Washington Council of Citizens Associations.
Palisades Citizens Association.
Petworth Citizens Association, Inc.
Rhode Island Avenue Citizens Association.
Summit Park Citizens Association.
Thomas Circle Citizens Association.
Washington Highlands Citizens Association.

Washington, D. C.

Highland Park Civic Association.
United Streets Association.

Highland Park, Michigan.

Dated February 2, 1953.

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Nadeau District Property Owners Association.
Neighborhood Protective Association, Inc.
Neighborly Endeavor, Inc.
The Parks Community Association.
Steadfast Neighbors Committee.
United Homeowners, Inc.
United Neighbors, Inc.
Vermont Square Neighbors, Inc.

Los Angeles County, State of California.

Southwood Improvement Association, Inc.

South San Francisco, California.

Santa Fe Place Improvement Association.

Kansas City, Missouri.

Arkansas Avenue Community Association.
Brentwood Terrace Citizens Association.
Brightwood Citizens Association, Inc.
Brookland Citizens Association.
Burroughs Citizens Association.
Capital Hill South-east Citizens Association.

Cathedral Heights-Cleveland Park Citizens Association.
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Congress Heights Citizens Association.
Michigan Park Citizens Association.
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National Gateway Citizens Association.
North Capitol Citizens Association.
North Cleveland Park Citizens Association.
North Washington Council of Citizens Associations.
Palisades Citizens Association.
Petworth Citizens Association, Inc.
Rhode Island Avenue Citizens Association.
Summit Park Citizens Association.
Thomas Circle Citizens Association.
Washington Highlands Citizens Association.

Washington, D. C.

Highland Park Civic Association.
United Streets Association.

Highland Park, Michigan.

Statement of Interest of Amici Curiae.

These *amici curiae* are organizations of home owners and small property owners in the State of California, principally in Los Angeles County. Their members own several thousand homes which are protected by private contracts from monetary loss as real as loss by fire which inevitably results from the use and occupancy of a neighboring house by non-caucasians. Their members have property rights in these private contracts the same as they have in their contracts of fire insurance which are endangered by the decision of the District Court of Appeal of the State of California, Second Appellate District, in the above case, *Barrows v. Jackson* (1952), 112 A. C. A. 613, 247 P. 2d 99.

Reasons Urged for the Granting of the Petition for a Writ of Certiorari in the Above Case.

It is of extreme and immediate importance to all parties to racial restrictive covenants in all states of the United States to have a ruling from the Supreme Court of the United States settling the questions presented in petitioners' petition for certiorari. Due to the present unsettled state of the law, the parties to these private contracts can not determine and their attorneys can not determine whether or not they may safely breach their valid contracts. Even in California where the District Court of Appeal, Second Appellate District, has held that the valid contracts can not be enforced, experienced attorneys at law can not advise the parties to restrictive

covenants with confidence because there has been no ruling by the Supreme Court of the State of California and because of the doubtful authority and unsatisfactory reasoning of the opinion of the District Court of Appeal, Second Appellate District, which holds that the complaint therein states a cause of action "apart from the constitutional issue" and further holds that the contract "is constitutionally a valid agreement," and then denies appellants any relief. The opinion of the District Court of Appeal of the State of California, Second Appellate District, is particularly questionable in view of *Correll v. Earley* (1951, ... Okla. ....., 237 P. 2d 1017, which reached the same conclusion as to validity of the contract as did the California court.

It is intolerable that such uncertainty should exist in the law concerning the use of real property. Responsible property owners are at a great disadvantage as compared to irresponsible property owners since the latter may profit excessively from the use of their property in violation of their valid contracts due to the fact that recovery against them would be small because they do not have much property in their names subject to execution.

These *amici curiae* respectfully entreat the Supreme Court of the United States to grant the petition for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, and settle the constitutional questions presented therein.

Dated February 2, 1953.

Respectfully submitted,

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HOWARD W. HUNTER,
PHIL H. JACKSON,
LATHAM & WATKINS,
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By EDWIN EARNSHAW,
Kansas City, Missouri,

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Counsel for Amici Curiae.

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IN THE

Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

Stipulated Consent to File Brief as Amici Curiae and BRIEF FOR 48 PROPERTY OWNER ORGANIZATIONS AS AMICI CURIAE.

JOHN M. ABBOTT,
CARL T. FETTERLY,
GILMAN & SHEARER,
HOWARD W. HUNTER,
PHIL H. JACKSON,
LATHAM & WATKINS,
OVERTON, LYMAN, PRINCE & VERMILLE,
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EDWIN EARNSHAW,
Kansas City, Missouri,
MORTON PERRY,
Oklahoma City, Oklahoma,
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IN THE

Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

STIPULATED CONSENT TO FILE BRIEF AS AMICUS CURIAE.

It is hereby stipulated and agreed pursuant to Rule 27 (9)(a) of the Revised Rules of the Supreme Court of the United States that the following named organizations may file their brief as *amici curiae* in the above entitled case, urging that the decision of the District Court of Appeal, Second Appellate District, State of California, be reversed.

Affiliated Neighbors.
Angeles Mesa Neighbors Association.
Annandale District Improvement Association.
Associated Neighbors.
Chesterfield Square Association.
Citizens United, Inc.
Cudahy Improvement Association.
Florence District Taxpayers Civic Association.

Hancock Park Neighbors, Inc.
Harvard Neighbors Association.
LaFayette Square Improvement Association.
Loyal Neighbors Association.
Nadeau District Property Owners Association.
Neighborhood Protective Association, Inc.
Neighborly Endeavor, Inc.
The Parks Community Association.
Steadfast Neighbors Committee.
United Homeowners, Inc.
United Neighbors, Inc.
Vermont Square Neighbors, Inc.
Los Angeles County, State of California.
Southwood Improvement Association, Inc.
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North Washington Council of Citizens Associations.
Palisades Citizens Association.
Petworth Citizens Association, Inc.
Rhode Island Avenue Citizens Association.
Summit Park Citizens Association.
Thomas Circle Citizens Association.
Washington Highlands Citizens Association.

Washington, D. C.

April 3, 1953.

Respectfully submitted,

JOHN C. MILES,
J. WALLACE MCKNIGHT,
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By CHARLES LELAND BAGLEY,
Counsel for Petitioners.

LOREN MILLER and
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PHIL H. JACKSON,
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JOHN H. CONNAUGHTON,
Washington, D. C.,

By JOHN W. PRESTON,
Counsel for Amici Curiae.

IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF AMICI CURIAE.

This brief is filed on behalf of the members of the following organizations, *amici curiae,* pursuant to stipulated consent of all parties and Rule 27(9)(a) of the Revised Rules of the Supreme Court of the United States:

Affiliated Neighbors.

Angeles Mesa Neighbors Association.

Annandale District Improvement Association.

Associated Neighbors.

Chesterfield Square Association.

Citizens United, Inc.

Cudahy Improvement Association.

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Washington, D. C.

Statement of Interest of Amici Curiae.

These *amici curiae* are organizations of home owners and small property owners in the states indicated following their names. Their members own several thousand homes which are protected by private contracts from monetary loss as real as loss by fire which inevitably results from the use and occupancy of a neighboring house by non-Caucasians. These valid contracts do not prevent the use and occupancy any more than fire insurance prevents fire but the loss is prevented in the same way. Their members have property rights in these private contracts the same as they have in their contracts of fire insurance which are endangered by the decision of the District Court of Appeal of the State of California, Second Appellate District in the above case, *Barrows v. Jackson* (1952), 112 Cal. App. 2d 534, 247 P. 2d 99.

Statement of Facts.

To conserve the time of this Court, these *amici curiae* adopt the statement of facts set forth in petitioner's petition for certiorari and incorporate the same herein by reference.

ARGUMENT.

The Petitioners Have Rights Guaranteed by the Constitution as Universally Interpreted Which the Decision of the District Court of Appeal, Second Appellate District, State of California, Has Taken From Them Without Due Process of Law.

This proposition is so self-evident, in view of the facts of this case, that it is difficult to simplify it further in argument. It is believed that space will be best served by presenting the following from leading cases and authorities:

> "The obligation of a contract is 'the law which binds the parties to perform their agreement.' Sturges v. Crowninshield, 4 Wheat. 122, 197, Story, op. cit. Sec. 1378. This court has stated that 'the laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms This principle embraces alike those which affect its *validity*, construction, discharge and enforcement . . . *Nothing can be more material to the obligation than the means of enforcement . . . The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the Constitution against invasion.*" (Emphasis added.)
>
> *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 429.

> "The Fifth Amendment 'is a limitation only upon the powers of the general government,' (Citing cases) and is not directed against the action of individuals . . . And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, not

to any action of private individuals.' Virginia v. Rives, 100 U. S. 313, 318; U. S. v. Harris, 106 U. S. 629. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.' Civil rights cases, 109 U. S. 3, 11. *It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property and there is no color whatever for the contention that they rendered the indenture void.*" (Emphasis added.)

Corrigan v. Buckley, 271 U. S. 323, 330.

See:

Correll v. Early (1951), 205 Okla. 366, 257 P. 2d 117, 120.

The contract sued upon is a lawful one [R. 34]. The Respondent is not entitled to complain of court action to which she has given her consent for consideration which she has received and enjoyed. No state action to the detriment of Respondent has been set in motion.

"The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,— . . ."

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 435.

"It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw *all* remedies, and thus, in effect, *destroy the*

contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. *Neither could it be done without impairing the obligation of the contract.* But it is equally well settled that the *Legislature* may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, *provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.*" (Emphasis added.)

Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 439; 47 L. Ed. 249, 250.

"It is true that what is prohibited is legislative action the effect of which would be the impairment of a contract; but what the legislature may not do in this regard certainly the courts may not do. *The power that is here denied the legislature was not reserved to the courts.* Great as are the equity powers of the courts, it is yet to be suggested that included in these powers is the power to *nullify* or impair *a legal contract* solemnly and intelligently entered into between competent parties."

Galey v. Guffey, 248 Pa. 523, 528, 94 Atl. 238.

Restrictions of a contractual nature are valuable property rights. They cannot be taken away even under power of eminent domain without compensation.

Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317.

"There is nothing unjust in holding him [the white vendor] to his bargain insofar as he alone

is concerned, but the state is denied power to enforce it [the covenant] because enforcement would work a prohibited discrimination against the buyer because of his race." (Interpretation added.)

Prof. McGovney, 33 Cal. L. Rev. 199, p. 21.

The above mentioned prohibition clearly has reference only to enforcement by injunction.

"To say that the Constitution forbids direct and actual *enforcement* of a racial covenant by injunction the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using restricted property—is not to say that it forbids awarding a neighboring property owner such damages, if any, as an executed sale to a Negro may be shown to have caused."

Hurd v. Hodge, 162 F. 2d 233, 240, footnote 22.

Where specific performance of a restrictive covenant would be against equitable principles, equity will not enforce it, but will leave the complainant to his remedy at law.

Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S. W. 2d 545.

The same rule applies where specific performance of a restrictive covenant would be against constitutional principles.

"Injunctive relief in the enforcement of a restriction may be and frequently is denied without impairment to the covenant as a basis for damages for its breach."

Welitoff v. Kohl, 105 N. J. E. 181, 189; 147 Atl. 390, 393.

See:

Borssuck v. Pantaleo, 183 Md. 148, 36 A. 2d 527.

"The general rule of law of contracts is well settled that in certain cases a breach of contract may give rise to two remedies, one an action at law for damages for the breach, the other a suit in equity for specific performance of the contract."

Weiss v. Leaon, 359 Mo. 1054, 1060; 225 S. W. 2d 127.

"For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages *unless it, too, is unconstitutional* under the circumstances." (Emphasis added.)

Weiss v. Leaon, 359 Mo. 1054, 1061; 225 S. W. 2d 127.

See:

Correll v. Early (1951), 205 Okla. 366; 257 P. 2d 117, 120.

Loren Miller, "Race Restrictions on Ownership of Land." 7 Lawy. Guild Rev. 99 (May-June, 1947).

At page 108:

"It is of course true that any man may contract freely with reference to his own property; he may even bargain away his own constitutional rights in the process."

At page 111:

"Our vision has become clearer too as regards the equal protection clause of the Fourteenth Amend-

ment. Courts, state and federal, have reiterated what we have always known, and not always practiced, that it is the individual who is entitled to the equal protection of the law."

n the case at bar, the only rights involved are the rights f petitioners and respondent, *i. e.*, their rights to contract nd their rights in their contracts.

"It [this Court] has no jurisdiction to pronounce any statute, either of the state or of the United States, void, because irreconcilable with Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safeguards to sound judgment. It is the dictate of wisdom to follow them closely and carefully." (Interpretation added.)

Liverpool, N. Y. & Phila. S. S. Co. v. Commissioners Immigration, 113 U. S. 33, 39.

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration, may be freely admitted, *but its solution cannot be promoted by depriving the citizens of their constitutional rights and privileges.*"

Buchanan v. Warley, 245 U. S. 60, 80-81.

The decision of the District Court of Appeal, Second Appellate District, State of California, in the case at bar has deprived the petitioners of their constitutional rights.

Conclusion.

Nothing could be more detrimental to our economic and governmental system of free enterprise than for our courts to refuse to enforce admittedly valid private contracts [R. 34][1] between the original parties thereto. This is most especially true when, in order to shirk this responsibility, the courts must depart from all rules of contract and constitutional law. The respondent had a constitutional right to make the promise she made to petitioners. She was fully compensated for her promise and petitioners have a constitutional right to recover such actual damages as they can prove resulted to them when the event happened which respondent promised would not happen.

We respectfully urge that the decision of the District Court of Appeal, Second Appellate District, State of California, be reversed.

Dated: April 3, 1953.

Respectfully submitted,

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---

[1] *Shelley v. Kraemer*, 334 U. S. 1, 13; *Corrigan v. Buckley*, 271 U. S. 323.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF

Of O'Fallon Park Protective Association, Council for Community Preservation, Chouteau-Lindell Improvement Association, West Walnut Manor Association, Northwest Business Men's Association, Northwest Improvement Association, North St. Louis Business Men's Association, Raymond Place Good Neighborhood Association, Kingshighway-Union Improvement Association, North Pointe Improvement Association, Walnut Park Protective Association, St. Louis Property Owners Association of America, Inc., Marcus Avenue Improvement Association, Northwest St. Louis Improvement and Protective Association, Mark Twain Improvement Association and Hamilton Place Association as Amici Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF OF AMICI CURIAE.

The following organizations who were and are interested in this Court's decision in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, and in the attempt being made in this case to convince this Court that it should expand its decision in the Shelley case to cover the present situation, have by consent of all parties and under rule 27 (9) (a), of the revised rules of the Supreme Court of the United States, filed this brief in an effort to reverse the decision of the court below. The organizations that join in this brief are as follows:

O'Fallon Park Protective Association
Council For Community Preservation
Chouteau-Lindell Improvement Association
West Walnut Manor Association

Northwest Business Men's Association
Northwest Improvement Association
North St. Louis Business Men's Association
Raymond Place Good Neighborhood Association
Kingshighway-Union Improvement Association
North Pointe Improvement Association
Walnut Park Protective Association
St. Louis Property Owners Association of America, Inc.
Marcus Avenue Improvement Association
Northwest St. Louis Improvement and Protective Association
Mark Twain Improvement Association
Hamilton Place Association

STATEMENT OF INTEREST OF AMICI CURIAE.

These amici curiae are organizations of home owners and small property owners in Missouri. Their members own several thousand homes which are protected by private contracts from monetary loss as real as loss by fire which inevitably results from the use and occupancy of a neighboring house by non-Caucasians. These valid contracts do not prevent the use and occupancy any more than fire insurance prevents fire but the loss is prevented in the same way. Their members have property rights in these private contracts the same as they have in their contracts of fire insurance which are endangered by the decision of the District Court of Appeal of the State of California, Second Appellate District, in the above case, Barrows v. Jackson (1952), 112 A. C. A. 613, 247 P. 2d 99.

STATEMENT OF FACTS.

To conserve the time of this Court, these amici curiae adopt the statement of facts set forth in petitioner's petition for certiorari and incorporate the same herein by reference.

JURISDICTIONAL STATEMENT.

Since the District Court of Appeal, Second Appellate District, of the State of California, held (112 A. C. A. 613, 247 P. 2d 99) that it would have granted the money judgment prayed for by petitioners except for what the District Court thought to be the insurmountable barrier of this Court's opinion in Shelley v. Kraemer (R. 34), it seems clear that there is no adequate State ground upon which the judgment of the District Court of Appeal can be predicated. Petitioners and these amici feel that the California State Courts have decided a Federal question of substance in a way "probably not in accord with the applicable decisions of this Court." Jurisdiction is here under 28 U. S. C. A. 1257 (3), and Rule 38, 5a, of this Court.

THE QUESTIONS PRESENTED.

The general question presented here is whether under the threatened money judgment of the District Court of Appeal of California against her for breach of the restrictive agreement, respondent would be deprived of liberty or property as forbidden by the Fourteenth Amendment. The specific question presented is whether this Court is prepared to expand its decision in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, to cover this case.

SUMMARY OF THE ARGUMENT.

I.

The equal protection clause of the Fourteenth Amendment is not involved in this case because respondent is sought to be held liable in the State courts of California, not because of her race or color, but because she violated her express agreement to the damage of petitioners.

II.

Respondent has no standing in this court to claim that the threatened State judicial action of California is unconstitutional as to the negro occupants of the real property involved if no personal right of respondent herself is in jeopardy.

III.

Respondent would not be deprived of liberty or property without due process of law by a California money judgment rendered against her, in that respondent was not forced by California State power to sign the restrictive agreement. Respondent had the opportunity, by refusing to sign the agreement, to control her own property. The element of control of property, if taken away from the owner on arbitrary grounds by state legislative or judicial action, entitles the owner to complain of deprivation of property without due process, but here respondent consented to the arrangement of which she now complains.

IV.

Having accepted the benefit and aided in the procuring of the agreement which is the subject of the action in

the State Courts, respondent is now estopped to claim that enforcement of the agreement in the California State Courts would violate her personal rights.

V.

This court has no jurisdiction to decide for the State of California what its internal public policy should be, nor may this Court question the fact that petitioners have been materially damaged by respondent's breach of contract.

ARGUMENT.

I.

Respondent Cannot in This Court Rely on the Equal Protection Clause of the Fourteenth Amendment.

Since the highest California Court from which a decision could be had has indicated that it would enforce the agreement which is the subject of the action in this case except for the federal question determined in respondent's favor, respondent is in the position of defending the view of the court below or losing in this court.

Respondent has urged before the State courts (R. 8), and with apparent success (R. 54), that this case arises under both the due process and the equal protection clauses of the Fourteenth Amendment. Respondent makes the same contention here.

That these clauses are not synonymous in their meaning or coextensive in the legal area they protect is settled by a decision of this Court that deserves to be quoted at length:

> . . . This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of protection they offer are not coterminous . . . But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause or upon the spirit of equality which might not be insisted on by local public opinion.

> They embodied that spirit in a specific guaranty . . . The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process . . . Truax v. Corrigan, 42 S. Ct. 124, 257 U. S. 312, 66 L. Ed. 254.

The "sphere of protection" specifically offered by the equal protection clause has been marked out by many other decisions of this Court to the effect that the clause is intended to secure and safeguard equality of right and of treatment against intentional and arbitrary discrimination by what may fairly said to be state action. That is the essence of Truax v. Corrigan, supra; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, and Sunday Lake Iron Company v. Wakefield, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154.

Respondent claims that a money judgment against her for violation of the restrictive agreement (which said agreement is admittedly free at least as an executory matter from the stigma of unconstitutionality, Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835; Shelley v. Kramer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161) would deny her the equal protection of the laws. But in view of this Court's construction of this clause in the above and many other cases, there is no substance in this claim.

That the equal protection clause does protect individuals against classification by state power on the basis of race or color is too clear to be disputed. Harmon v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L. Ed. 831; Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149; Richmond v. Deans, 281 U. S. 704, 50 S. Ct. 407, 74 L. Ed. 1128; Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208. But the protection offered is personal protection and the rights

protected are personal rights. Oyama v. California, 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 249. Has **respondent** been classified or singled out by the California State courts on the basis of **respondent's** race or color? The plain fact is that respondent has been threatened with a money judgment against her, not because of her race or color, but because she signed the agreement in evidence and then violated her agreement to the damage of petitioners (R. 4, 5). That the State courts of California or any other state would, upon proper application, render a like judgment against any person "similarly situated", irrespective of his race or color, cannot be disputed by this Court. For a State court to affirm the right of an individual to collect damages against any signatory (of any race or color) upon breach of a restrictive agreement is not the "indiscriminate imposition of inequalities" condemned in the Shelley case. In other words, respondent is sought to be held liable, not by reason of the legal transcendentals of her race or color, but by reason of her overt act, the deliberate violation of a contract.

Once it is admitted that the basis of the proposed State court judgment is not respondent's race or color, the equal protection clause falls out of the case; for no right of **respondent** can be shown to be within its scope.

II.

Respondent Has No Standing in This Court to Protect or Assert the Rights of the Negro Occupants of the Real Property Concerned.

The negro occupants of the real property concerned are not parties to this suit. Nor are they represented here by counsel. No relief was asked against them in the Courts below. No relief is asked against them here. They are immune from attack both at law and in equity under the rule in the Shelley case. They **as persons** are not

and cannot be hurt or injured by either the decision of the State court or this Court, whatever that decision may be. Their title and possession is an accomplished fact which is beyond all State and Federal power to disturb. This case is moot as to them, and this Court does not sit to settle issues which events have put at rest. U. S. v. Alaska Steam Ship Company, 252 U. S. 572, 40 S. Ct. 448, 64 L. Ed. 808.

While this Court held in the Shelley case that State court action operating **directly** and **adversely** upon the personal rights of negro owners of restricted real property denied these negro owners the equal protection of the laws, it is clear that the Constitutional guaranties preserved to the negro minority may not be arrogated to her own defense by Respondent. In short, Respondent may not assert that State action is unconstitutional as to others if it is not unconstitutional as to her. Jeffrey Manufacturing Company v. Blagg, 235 U. S. 571, 35 S. Ct. 167, 59 L. Ed. 365; Erie Railroad v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1115. That there must be a causal connection between the State action complained of and the very personal right sought to be vindicated is an axiom known to many fields of law. That a Constitutional question is not exempt from the range and authority of this rule is the conclusion to be drawn from such decisions of this Court as Cronin v. Adams, 192 U. S. 108, 114; Hatch v. Reardon, 204 U. S. 152, 160; The Winnebago, 205 U. S. 354, 360; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550; Hendrick v. Maryland, 235 U. S. 610, 621; Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289; Henneford v. Silas Mason Co., 300 U. S. 577, 581; Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 227.

Respondent in seeking to assert in this Court the possible claims of another may not "assume the role of actor"

so that there may be a ruling here under the equal protection clause of the Fourteenth Amendment. Doremus v. Hawthorne, 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 310. Nor may Respondent call upon this Court to rule a point under circumstances that do not constitute a "case or controversy"; for the jurisdiction of this Court is cast in those terms. Doremus v. Hawthorne, supra. This Court does not sit as a corrective tribunal for the States in matters that are purely academic or in the air. For this Court's jurisdiction to attach, the facts must constitute the earthy stuff of which litigation is made. United Public Workers v. Mitchell, 330 U. S. 775, 67 S. Ct. 556, 91 L. Ed. 754; Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688; and cf. Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 295.

Even though the negro occupants were parties, they could not vex the judicial ear with complaints, because their property rights here have crystallized and stand forever beyond the reach of State power in all forms. They are hence merely members of a vague and ghostly group. Their rights are as tenuous as those of the taxpayers in Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078.

III.

A Money Judgment Granted Petitioners in the State Courts of California Would Not Deprive Respondent of Liberty or Property Without Due Process of Law.

Having concluded that the equal protection clause is not involved in this case, it is now necessary to determine Respondent's contention that a money judgment against her would deprive her of liberty or property without due process of law (R. 8). That the exercise of State judicial power may be measured by this Court against the require-

ments of the Fourteenth Amendment is admitted. Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 50 S. Ct. 86, 74 L. Ed. 1107; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Standard Oil v. Missouri, 224 U. S. 270; Hansberry v. Lee, 311 U. S. 32. The contention was not made in the Shelley case and is not made here that the mere fact that a State court is acting unaided by Statute excepts the State from constitutional responsibility if the "rule of law" evolved in the court's judicial thinking is offensive to the Federal Constitution. But when does the State court "act" in the Constitutional sense? When does the due process clause attach, if at all?

Counsel who have written this brief argued in Respondent's main brief in the Shelley case (p. 23 et seq.) that the various progressive steps used by State courts in arriving at the conclusion condemned in the Shelley case should be examined separately, and, by a process of elimination, the guilty element should be clearly silhouetted by this Court and labeled with the badge of constitutional criminality. The argument presented then went like this:

Neither the majestic generalities of the Fourteenth Amendment nor the Federal Statutes enacted under its enabling clause can reach the restrictive covenants themselves, there being no State action up to this point. Slaughterhouse Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290; Ex parte Virginia, 100 U. S. 339. The mere filing of the suit by the individuals interested is similarly insulated against Constitutional objection. The **judgment** of a State court is not to be condemned per se, even though the judgment is State "action" of sorts; for the judgment is simply the conclusion that must logically be reached by a State court as a result of its judicial premises. Allis-Chalmers Co. v. U. S., 162 F. 679; Groton Bridge Co. v. Clark Pressed Brick

Co., 136 F. 27. That the judgment viewed in a vacuum is not the offending element can also be gleaned from this Court's reasoning in Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382. In the Tidal Oil case this Court made it clear that when a State Statute (which dictates the judgment) is questioned under the Contract Clause of the Constitution, the Statute itself (if violative at all) is the "State action" condemned and not the judgment of the State court which the guilty Statute compels. Respondents in the Shelley case then concluded that the only possible source of offense in State judicial action of the sort that occurs in these cases is the "rule of law" or the "internal law" of the particular State before the bar; for it is this "rule of law" or "common law interpretation" that is the controlling element, when no Statute is involved. This conclusion is buttressed by this Court's decision in Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, in which State "law" evolved by judicial decision alone was announced as controlling doctrine before the District Courts of the United States in diversity cases. Respondents then concluded that Missouri had not by its judicial gyrations evolved any "rule of law" that prevented any negro from owning property simply because he was a negro. Such a rule, Respondents conceded, would have violated the Fourteenth Amendment, in that a State Statute or a city ordinance incorporating such a rule into legislative command would place a purely arbitrary and captious limitation upon a negro's right to buy real property from a willing seller; Respondents further conceded that a judicial decision to the same effect would be similarly offensive to the Constitution. Prudential Life Insurance Co. of America v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L. Ed. 1044. Respondents then pointed out that Missouri's rule was merely permissive of the private discrimination protected by the Civil Rights Cases and not mandatory of the public discrimination that was the result

of the Statute and ordinance in Harmon v. Tyler, and Buchanan v. Warley, supra.

This Court, after presumably giving consideration to this argument, stated that it had "no doubt that there has been State action in these cases in the full and complete sense of the phrase" and that "it is clear that but for the active intervention of the State Courts, supported by the full panoply of State power, petitioners would have been free to occupy the properties in question without restraint." While the Court did not state and these amici are still at a loss to know what phase of Missouri or Michigan State court "action" was offensive to the Fourteenth Amendment, Respondents and their counsel in the Shelley case and the amici filing this brief have concluded, after repeated discussion and careful consideration in the intervening years, that this Court's reasoning in the Shelley case may be fairly summarized as follows:

> It is true that no State may pass a legislative act forbidding negroes to own or occupy real property. Harmon v. Tyler, supra. It is true that no State court may by any method arrive at and apply a rule of decision to the same effect. Prudential Life Insurance Company of America v. Cheek, supra. It is true that restrictive covenants standing alone are no concern of the Fourteenth Amendment. Civil Rights Cases, supra. But it is further true that a State court judgment enforcing these covenants against a willing negro buyer and a willing white seller is predicated on a rule of law to the effect that a negro may not buy land if white people privately agree that he may not. This rule is not substantially different from the legislative act condemned in Harmon v. Tyler; for in the Harmon case this Court struck down an ordinance which permitted a negro to own property in a given area only if he could obtain the consent of the white residents of the area. Hence both in this case (this Court rea-

soned) and in the Harmon case, the negro's fee title was dependent on a situation which the negro had no hand in creating and could not necessarily control. In the Harmon case the negro might not be able to get the consents of the neighbors necessary to his title. In this case, the negro might not be able to obtain the consents of the contract signatories necessary to his title. Therefore (this Court concluded) the negro is being placed by the State courts in a position wherein he is helpless to help himself and this simply by reason of his race or color. Thus the Missouri and Michigan rule of law denies the negro the equal protection of the laws and the judgments of the Missouri and Michigan Courts based on such a rule of law must be reversed. (This, counsel respectfully submit, is the rationale of the Shelley case.)

All that remains is to apply the true rationale of the Shelley case in this case.

It is important to note that the Harmon and Buchanan cases were due process cases. These decisions declared invalid legislative acts that forbade sale of real property to negroes because such acts placed an arbitrary limitation on the control by the white owner of his own fee title. This was thought by the Court to constitute a confiscation by the State of a white owner's property right and hence a violation of the due process clause. It may be admitted that a rule of decision to the same effect would be similarly invalid.

Suppose (to go a step farther) that a white owner buys property which is encumbered by a pre-existing restrictive agreement against sale to negroes. Suppose, after violation by the white owner of the agreement, the white seller is subjected to a money judgment by one of the signatories to the original agreement. Here we have a situation that involves a State rule of law approaching in legal effect the

ordinance in the Harmon case. Just as in the Harmon case the "willing white seller" could not necessarily obtain the consents of the other residents essential to convey his property to the "willing negro buyer", so too in the hypothesized case the "willing white seller" could not necessarily obtain the consents of the signatories essential to successful conveyance to his "willing negro buyer".

In the Harmon case, the sale was made void by ordinance. In the supposed case, the sale could be made void by a court of equity applying a rule of law equivalent to the ordinance. In both cases, the white seller has without his consent been stripped by State action of the right to sell his property to whom he pleases and he is thus deprived of a property right without due process of law.

It must be concluded generally from all prior decisions of this Court that a willing seller of real property may claim violation by State action of due process only when the State (acting legislatively or judicially) forbids the proposed transfer without offering the seller an opportunity at some stage of the proceeding to have his say about the matter; for in the last analysis a legislative act is subject to control by the persons it seeks to bind only by way of the ballot box control over the officials who have enacted or propose to enact it. But the protection offered by such a right of control is too remote and uncertain to square with the demands of due process. If this were not true, a legislature could act without any constitutional responsibility whatever except insofar as the individual members thereof might be subject to the loss of office if the public thought they went too far. Similarly, a rule of property created by private agreement is subject to control only by those who originally called the agreement into being. A white buyer who takes the property subject to the agreement has no voice in its creation. He can only ask that the restrictions be not enforced against

him if he decides to sell to the unwanted minority. But this protection is also too tenuous to respond to the commands of due process. Hence it is fair to conclude that the white property owner may take refuge in the due process clause only when it appears that a State Court threatens to carry out to his detriment the Legislative will (over which he has no control) or the will of private individuals (over which he has no control). In either case he would be forbidden by State power to alienate his property as seems best to him.

Here, however, more appears. Respondent admittedly voluntarily signed the agreement in evidence and consented to be bound by its terms. Here, we do not have a legislature or a city council creating a law that binds her without her say. Nor do we here have a rule of property created by private action and enforced by a State court which seeks to bind Respondent without giving her a voice in the matter. Respondent was not bound or coerced by State power in any form to sign the agreement. Respondent by signing freely gave up her right to be the "willing white seller" of which the Shelley case makes much. Respondent had a direct hand in creating the very situation of which she now complains. She could have controlled her own property rights so as to be free from "State action" by refusing to sign the agreement. But she chose to sign it, and petitioners have elected not to permit her to change her mind.

The cardinal element of control, absent in the Shelley case, present in this case, makes the Shelley rule unavailable to Respondent here. She has not been deprived of property without due process of law.

IV.

Respondent Is Estopped to Assert That She Has Been Deprived of Rights Secured to Her by the Constitution.

That one who accepts the benefits of a law cannot be heard to complain of its burdens is well established constitutional doctrine. This rule has been frequently called into play against persons who attack statutes after having partaken of the advantages offered by them. United Fuel Gas Co. v. Kentucky Railroad Commission, 278 U. S. 300, 49 S. Ct. 150, 73 L. Ed. 390; Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737, 48 L. Ed. 1115. In the Shepard case, this Court refused to permit owners of real property to question the validity of an Ohio law laying down a method of land assessment for public improvement, when the owners themselves had petitioned for improvement under the law and had caused bonds to be issued on the strength of the law's validity. This Court used language not without application here:

> "Provisions of a constitutional nature intended for the protection of the property owner may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provisions, and where it would be unjust to others to permit it to be set up. Certainly, when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted upon general principles of justice and equity to claim that the action which he has himself instigated and asked for and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to others." 48 L. Ed. 1115, 1121.

Respondent signed the agreement in evidence in October of 1944, and enjoyed its benefits until February of 1950 (R. 2, 4). Respondent's signature on the agreement is conclusive evidence that Respondent was active in procuring the execution of the agreement. Respondent, after having enjoyed the fruits of the agreement that protected the value of her property, now wishes to walk out unscathed and transfer the monetary loss to the other signatories. Respondent's position is no different from a lobbyist or legislator who actively participates in the passage of an act and then seeks to use the Fourteenth Amendment as a locus poenitentiae when the act for which he is at least partly responsible no longer serves his personal ends.

While the Shepard case concerns a statute, the very theory of "state action" advanced here by Respondent should make the doctrine of the Shepard case applicable to the California "rule of law" which Respondent has here attacked.

V.

This Court Has No Authority to Decide State Public Policy.

These amici do not deem it amiss to point out that the validity and enforceability (absent a federal question) of the restrictive agreement in evidence are matters inexorably entwined in the public policy of the State of California. It is well settled that this Court will not and cannot substitute its judgment in such matters for the judgment of California. And to determine what the public policy of a State may be, this Court will be exclusively guided by the judicial pronouncements of the highest appellate Court of the State concerned or by the Constitution and Statutes of that State if its courts have not spoken on the particular subject of inquiry. This is the import of such cases as Griffin v. McCoach, 313 U. S.

498, 61 S. Ct. 1023, 85 L. Ed. 48; Wheeler v. Smith, 50 U. S. 55, 9 How. 55, 13 L. Ed. 44; Preston's Heirs v. Bowman, 19 U. S. 580, 6 Wheat. 580, 5 L. Ed. 336.

Here the high courts of California have provided this Court with an impressive array of decisions that conclusively dispel any notion that California finds restrictive agreements to be incongruent with the safety, morals or general well being of her residents. Los Angeles Investment Co. v. Gary, 81 Cal. 680; Janss Investment Co. v. Walden, 196 Cal. 753; Burkhardt v. Lofton, 63 Cal. App. 2d 230.

Similarly the fact that petitioners have suffered damages as a result of Respondent's breach of contract (R. 5, 6) is admitted by Respondent's demurrer and is conclusive for purposes of this Court's jurisdiction. Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

CONCLUSION.

While these amici do not feel that this Court reached the right conclusion in the Shelley case, they emphasize that this Court need not overrule nor limit the Shelley decision in order to prevent the Respondent in this case from perpetrating upon petitioners what these amici view as an outright fraud.

It is true, as has been suggested, that if the States are permitted to render many judgments upon proper application against one who has breached a restrictive agreement, the threat of such action may prove a deterrent to the sale of certain real property to members of a racial minority. But this argument misses the point. No person, white or negro, has any right protected by the Federal Constitution to **compel** sale to him of any particular piece of real estate. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969. If a negro has received a deed to property or has an earnest money contract guaranteeing

conveyance to him of real property, his rights under such deed or contract cannot be disturbed by State power. But unless and until a prospective negro purchaser has from a prospective white seller some definite commitment recognized by law, the negro's legal position is no different from any other prospective buyer, white or negro. Until and unless the necessary legal connection (deed or contract) exists between the negro and his prospective white seller, the negro has no property or civil right that may enjoy a "preferred position" before this or any Court. Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 26, 90 L. Ed. 265. The fact that the white owner may be deterred from calling such a connection into being because he knows or suspects that he will be forced to pay damages caused thereby to others, merely furnishes a motive for his refusal to create such a connection. We have not yet come to the point, it is hoped, where an individual's reason for refusing to sell his real property to a willing buyer of any race, color or creed, can be made the subject of judicial investigation.

Wherefore, these amici curiae pray the Court to reverse the judgment of the District Court of Appeal of California and remand the cause to that Court for further proceedings in accord with the internal substantive law of that State.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR, and M. M. O'GARA, *Petitioners,*

vs.

LEOLA JACKSON, *Respondent.*

On Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District

BRIEF OF

AMERICAN VETERANS COMMITTEE, INC. (AVC)

Amicus Curiae

PHINEAS INDRITZ,
National Counsel,
American Veterans Committee.

April 20, 1953.
Washington, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR,
and M. M. O'GARA, *Petitioners,*

vs.

LEOLA JACKSON, *Respondent.*

BRIEF OF
AMERICAN VETERANS COMMITTEE, INC. (AVC)
Amicus Curiae

The issue in this case. This case is an attempt to undermine the rulings by this Court in 1948 that racially restrictive covenants may not be judicially enforced. *Shelley* v. *Kraemer,* and *McGhee* v. *Sipes,* 334 U. S. 1; *Hurd* v. *Hodge,* and *Urciolo* v. *Hodge,* 334 U. S. 24; *Trustees of the Monroe Avenue Church of Christ* v. *Perkins,* 334 U. S. 813; *Amer* v. *Superior Court of California,* 334 U. S. 813; *Kim* v. *Superior Court of California,* 334 U. S. 813. All of these cases arose because some white persons had sold houses to persons of Negro, Oriental or other non-Caucasian ancestry, despite the terms of neighborhood

agreements which forbade the sale of the land to, or its occupancy and use by, persons of such proscribed ancestry. When the neighboring white persons, having no interest in that land except their alleged interest in the exclusion of non-Caucasians from the community, found that they could not prevent the transaction by their own efforts, they sought court injunctions to forbid the white sellers from selling to the non-white purchasers, to divest these purchasers of title to their homes, and to forbid the purchasers from occupying and using the homes they bought from the willing white sellers.

In decisions which are landmarks on the road toward Equal Justice under Law, this Court, after the most thorough canvassing of the legal issues and the factual settings, held that racially restrictive covenants are judicially unenforceable. The decisions in the cases arising from States rested on the concept that judicial enforcement of such covenants was State action which violated the Equal Protection clause of the Fourteenth Amendment. In the cases arising from federal territory (the District of Columbia in those instances), this Court ruled that federal courts are precluded from enforcing such covenants, not only by an Act of Congress (Sec. 1978, Rev. Stat., 8 U.S.C. 42), but also because it would be inconsistent with the public policy of the United States for a federal court to enforce a covenant the enforcement of which by a State court would violate the guarantee of the equal protection of the laws.

This case, like the 1948 cases, involves a racial covenant the sole purpose of which is to bar from the neighborhood persons of certain racial ancestry. The covenant, signed in October 1944 by the Respondent and two of the three Petitioners, provided that no part of the land described therein "should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race" except "as domestic servants or other employees"; that the covenant was "to be a covenant running with the

land"; that each signer would incorporate this restriction in future conveyances of the land; and that if the land "should ever at any time be used or occupied" by such proscribed persons, "then in that event the covenantor who covenanted as to that lot, or his heirs, executors, administrators, successors, or assigns, would immediately become liable to those covenantors, their heirs, executors, administrators, successors, or assigns, whose lots were not so occupied for all damages which they may have suffered by reason of the breach thereof" (R. 3). As Mr. Chief Justice Vinson pointed out for the unanimous Court in the *Shelley* decision (at p. 10): "It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'"

Within six years after she signed the covenant, the Respondent had changed her mind. In February 1950 she sold her house without inserting the covenant restriction in the deed of conveyance, and in September 1950 Negroes moved in and occupied the house (R. 4). The Petitioners in this case, finding themselves barred by the *Shelley* case from using governmental power directly against the proscribed non-Caucasians, seek to accomplish the same result indirectly by using governmental power to enforce the covenant through the imposition of money judgments against the white seller. It is obvious that the imposition, or the threat of imposition, of such judgments would discourage or effectively prohibit sales to Negroes and members of other proscribed groups. See Part III of this Brief (pp. 12-15).

The issue here is whether the courts of California correctly ruled that they may not constitutionally exercise

governmental power to enforce a racial covenant by imposing money damages on a person who once had agreed to such restrictions but later changed his mind and failed to comply with the restrictions.

Interest of the American Veterans Committee. The American Veterans Committee, Inc (AVC) is a nation-wide organization of veterans who served honorably in the Armed Forces of the United States during World Wars I and II, and the Korean Conflict, and are now associated to promote the democratic principles for which we fought. We believe that racial discrimination is inconsistent with our Nation's basic principles, that it is harmful to our national welfare at home, that it adversely affects our relations with the peoples of the world, and that it is a potential catalyst for future military hostility against the United States. We therefore urged this Court, in 1948, to refuse judicial enforcement of racially restrictive covenants. 334 U. S. at 3 and 25. We think that the attempt in this case to enforce such covenants through judicial action imposing money judgments is of a piece with the effort made in 1948 to enforce them by court injunctions, and should similarly be rejected as alien to the Constitutional principles which govern this Nation. The honor and sanctity of the Constitutional principle of Equal Protection of the Laws is not less "at law" than "in equity."

I. Judicial enforcement of a racially restrictive covenant, whether by a money judgment or otherwise, is governmental action in violation of the Fourteenth Amendment.

In *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); and *City of Richmond* v. *Deans*, 281 U. S. 704 (1930), this Court held invalid, under the Fourteenth Amendment to the Federal Constitution, any legislation which restricted the sale of land to, and its occupancy by, any person, solely on the basis of race or

color. Two of these cases (*Buchanan* and *Harmon*) involved suits challenging "the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color." *Shelley* at 12. These cases decided that no court could constitutionally enforce such restrictions against the white seller even though the restrictions were "encased in the armor wrought by prior legislative deliberation." *Bridges* v. *California*, 312 U. S. 252, 261 (1941).

In 1948, this Court established beyond cavil that judicial action is State action subject to the restraints of the Fourteenth Amendment; that judicial enforcement of restrictions which discriminate against persons because of their race violates that Amendment, even though "the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals" (*Shelley* at 13); and that property owners who are parties to such agreements are not denied equal protection of the laws when they are denied "access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements" but the enforcement of which would violate constitutional rights of other persons. *Shelley* at 22.

A court order imposing a money judgment on a white seller, for selling his land to, or permitting its occupancy by, a person proscribed in a racially restrictive covenant, is obviously judicial enforcement of the covenant. It would destroy the seller's constitutional right to dispose of his property "free from restrictions as to potential purchasers based on considerations of race or color." Under this Court's decisions holding that such covenants are not judicially enforceable, such a court order would be unconstitutional. The decision of the court below should therefore be affirmed.

II. There is no merit in the Petitioners' efforts to distinguish this case from this Court's earlier decisions on racial property restrictions.

A. The prohibition against judicial enforcement of racial property restrictions, made explicit by this Court from 1917 to 1948, is not limited to injunction suits.

The Petitioners do not challenge the established doctrine that no legislature could constitutionally impose racial restrictions dealing with the sale of property, whether those restrictions are to be enforced by injunction, assessment of money damages, or any other means.

Nor do the Petitioners challenge the holdings of the *Shelley* and *Hurd* cases insofar as those cases refused to grant injunctive relief based on the privately created racial covenants. Although much of the Petitioners' Brief deals with the argument that the Respondent had "consented" to the covenant restrictions (see Part II, D of this Brief), they do not really rely on that argument. That argument, if it had merit, would apply with equal logic to *injunction* suits against white sellers who, like Mrs. Corrigan in *Corrigan* v. *Buckley*, 271 U. S. 323 (1926), had been signatories to the covenant. However, the Petitioners recognize the hopelessness of trying to undermine the 1948 decisions insofar as concerns suits to enjoin white sellers from selling land to colored purchasers,[1] and therefore they concede that since enforcement of a racial covenant by injunction against a white seller would deprive the Negro of his right to buy, such covenant could not constitutionally be enforced by injunction against a white seller even if he had signed the covenant. See *Brief for Petitioners*, pp. 39-40. What the Petitioners say, then, is that the 1948 decisions, since they involved injunctions, must be limited solely to injunction cases and do not apply to a suit for money judgment.

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[1] In the 1948 case of *Urciolo* v. *Hodge*, this Court invalidated the injunction against Urciolo, the white seller.

But the crucial point in the 1948 decisions was that the aid of State power was being sought to achieve a discriminatory purpose which could not be achieved solely by private and "voluntary adherence" to the terms of the covenant. Here, too, the Petitioners could not, by "voluntary adherence" to the terms of the covenant, achieve their discriminatory purpose to keep Negroes out. Here they seek "more," namely, to have the State courts exert governmental power against the person whose sale may have enabled the Negroes to move into the community. They frankly state that what they seek is "enforcement" of the racial covenant. *Brief for Petitioners*, pp. 21, 24, 41, 42, 45.

Enforcement of the racial covenant restriction, however, is precisely what this Court in 1948 said was unconstitutional for a State court to do. This Court did not limit its decisions to suits for injunction, or recognize any constitutional difference between injunction suits and suits for money judgment or other types of suits. Instead, this Court throughout its opinions uniformly and repeatedly emphasized that it was dealing with "court enforcement," "judicial enforcement," "governmental action," "State authority," "action of State courts," "State action," "State power," "enforcement by State courts," "power of government," "exertions of State power in all forms." It distinguished such governmental enforcement from effectuation of the agreements "by voluntary adherence to their terms." *Shelley* at 13; *Hurd* at 31. "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights . . ." *Shelley* at 19. Nor can it be said that this Court overlooked the possibility of a suit for money judgment, since the covenant in the companion *Hurd* and *Urciolo* cases, quoted at p. 26 thereof, for-

bade Negro occupancy of the land "under a penalty of Two Thousand Dollars ($2,000)."

The 1948 decisions simply cannot be read, as the Petitioners here contend, as applying solely to injunction suits.

B. This Court has never ruled that a racially restrictive covenant is "valid" for purposes of judicial enforcement through money judgments, or for any purpose other than private and voluntary adherence to its terms unsupported by any governmental action.

Equally erroneous is the Petitioner's argument that this Court has held the covenants themselves to be "valid contracts" and has therefore implicitly recognized their enforceability in a suit based on the "valid contract." Neither *Corrigan v. Buckley*, 271 U. S. 323 (1926) nor the 1948 Restrictive Covenant decisions stand for any such proposition.

The *Corrigan* case dealt only with the technical question of this Court's jurisdiction, arising from the fact that the pleadings in that case raised only a contention that the Constitution rendered the *covenant itself* "void". Such a contetntion could not confer on this Court jurisdiction to hear the appeal, since the Constitutional Amendments relied on apply only to governmental action and do not apply to the action of private individuals,—so long as their action remains private. And the Court specifically pointed out that neither the petition for appeal nor the assignment of error had raised the question of the validity of *judicial enforcement* of the covenant. *Corrigan* at pp. 330, 331; see also *Shelley*, p. 8. Hence the appeal was necessarily "Dismissed for want of jurisdiction." *Corrigan*, p. 332.

This Court took precisely the same view in the 1948 cases, *i.e.*: that neither the Constitution nor Sec. 1978, Rev. Stat. invalidates (outlaws, or makes unlawful) the restrictive agreements "standing alone" or "so long as the purposes of those agreements are achieved by the parties through voluntary adherence to their terms." *Shelley* at 13; *Hurd* at 31.

Thus, what this Court meant, plainly, is that the *making* or *signing* of a racially restrictive covenant and *voluntary adherence* to its terms did not violate the law, did not subject the persons who do so to punishment by fine or imprisonment or other penalty, and did not violate anyone's constitutional rights.[2]

But where there is "more"—when they seek to enforce the covenant with the power of government, expressed through its courts or other agencies—they move into conflict with the Fourteenth Amendment which prohibits State support of the racial discrimination.

As the trial court put it in this case, "a prodigious feat of legal legerdemain is required to transfer the passing observation of the Supreme Court to the effect that, so long as the parties voluntarily adhered to their agreement, no question would arise under the Fourteenth Amendment, into a holding that such a discriminatory agreement is valid." (R. 14).

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[2] Congress could, of course, enact a law forbidding the making of such agreements. See *United States* v. *Williams*, 341 U. S. 70, 72 (1951). *Compare* the following regulations of the Federal Housing Administration and the Veterans Administration prohibiting the making and recording of such racial restrictive covenants, under penalty of loss of eligibility for federal home loan insurance and guarantee:

F. H. A. regulations: 24 C. F. R. (1952 Supp.) secs. 203.19; 203.24; 203.29; 221.29; 221.37; 221.42; 232.16; 232.24(c); 232.25; 241.15; 241.23; 242.18; 242.25; 276.28a; 276.34a; 276.37a; 278.20a; 278.26a; 278.29a; 280.22b; 280.35; 280.35a; 283.22a; 283.31a; 287.27; 287.34; 288.25; 288.30; 290.8(g); 292.24; 292.38; 292.39; 294.20; 294.25; 294.33; 296.16; 296.31. See R. 56-57 for one of these regulations.

V. A. regulations: 36 C. F. R. (1951 Supp.) secs. 36.4308(e); 36.4320(h)(5); 36.4350(a)(7); 36.4515(c).

It is probable, although not yet litigated, that the making of racially restrictive covenants may also violate the Anti-Trust Laws, at least in federal areas such as the District of Columbia. See Philip Marcus, "Civil Rights and the Anti-Trust Laws," 18 *Univ. Chi. L. Rev.* 171, 208-214 (Winter 1951).

C. State courts do not have greater power to enforce racial covenants in suits against white sellers than in suits against colored purchasers.

Throughout their brief, the Petitioners try to distinguish this case from the 1948 decisions by saying that the 1948 decisions protected the right of the colored persons to buy whereas here the Petitioners are proceeding solely against the white seller who had once agreed to the covenant. But this Court, in holding that racial restrictive covenants are judicially unenforceable, did not demarcate between the white seller and the Negro purchasers.

This Court pointed out, in *Shelley* at p. 12, that both the *Buchanan* and *Harmon* cases, invalidating racial zoning laws, "involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color." And in *Urciolo* v. *Hodge*, the companion case to *Hurd* v. *Hodge*, this Court ruled that the restrictive covenant containing the "penalty of $2000" could not be judicially enforced against Urciolo, the white seller, for the same reasons that it could not be enforced against the colored purchasers. The color of the defendant is, clearly, constitutionally irrelevant.

D. The Respondent's signature of the covenant in 1944 does not take this case outside the scope of this Court's prior decisions holding such covenants judicially unenforceable.

The last prop upon which the Petitioners rely, then, is that the white seller in this case, by having signed the agreement in 1944, has "consented" to judicial enforcement of the covenant and the imposition of a money judgment against her and therefore the Courts of California must enforce the covenant against her.

Assuming *arguendo* that the Respondent's signature of the covenant could make it judicially enforceable against her, that portion of the covenant requiring her to incorporate the covenant restrictions into any subsequent deed of conveyance, related, in 1944, only to the exclusion of non-

Caucasians. But in December 1949, the Federal government announced regulations that the execution and recording of such racial restrictions would make the land ineligible for F. H. A. and V. A. financing. 14 F. R. 7579-82, 7588 (Dec. 20, 1949); see footnote 2, *supra*. If the Respondent, under compulsion of the covenant, had taken action contrary to these regulations, she would have been barred from selling her land to all potential purchasers, white or colored, who must use FHA or VA financing in order to purchase a home. Such a drastic restriction upon her right of access to the white market[3] she certainly never "consented" to. Hence, even under the Petitioners' theory of liability on the basis of "consent," the imposition of a money judgment for her failure to include the covenant in her 1950 deed would violate her Constitutional rights.

In any event, however, the Respondent could not bargain away the inhibition which the Fourteenth Amendment imposes, not on her, but on the courts of California. Nor does her signature to the covenant estop her from challenging the validity of judicial action enforcing the covenant against her. Even the Petitioners admit that the covenant here involved is an agreement whose enforcement by governmental power would, in the absence of the Respondent's "consent", be unconstitutional (*Shelley* at 23), and that its enforcement by Federal courts would be contrary to an Act of Congress and the public policy of this Nation (*Hurd* at 34-35).

This Court has uniformly refused to invoke any estoppel against a party to a contract who challenges the enforce-

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[3] The extent of the market from which she would be barred if she included the racial restriction in her deed is enormous. At the end of 1952, 43.6 percent ($25.4 billion) of the total mortgage debt of $58.2 billion outstanding on non-farm 1- to 4- family properties in the United States was underwritten either by the F. H. A. (18.5 percent or $10.8 billion) or the V. A. (25.1 percent or $14.6 billion). *Federal Reserve Bulletin*, page 275 (March 1953).

ability of the contract on grounds that its enforcement is against public policy or contrary to statute or the Constitution. *Continental Wall Paper Co.* v. *Louis Voight & Sons, Inc.*, 212 U. S. 227, 262 (1909); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88 (1902); *McMullen* v. *Hoffman*, 174 U. S. 639, 669 (1899); *Oscanyon* v. *Arms Co.*, 103 U. S. 261 (1880). In such cases, the courts are concerned, not with the respective "equities" of the parties as between themselves, but with the vindication of the public interest served by the challenge to the contract. Courts are not automatons blindly enforcing whatever contracts private individuals may have once agreed to. That public interest so greatly outweighs the interest of enforcing agreements between private parties that such challenge is permitted even where a defendant has specifically contracted with the plaintiff that he will not challenge that very contract. *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric Mfg. Co.*, 329 U. S. 402 (1947). If the signer of a contract is not estopped from raising statutory or public policy defenses against the enforceability of the contract, he should not be estopped from raising the infinitely more fundamental defenses based on the Federal Constitution.

III. Enforcing the covenant by the imposition of money damages on the white seller will affect not only the pocketbook of the seller but the fundamental civil rights of all potential purchasers against whom the covenant is directed.

A considerable portion of the Petitioners' argument is devoted to the proposition that enforcement of the covenant by a money judgment against the white seller would not affect the Negroes who have already moved into the house which the Respondent sold. But to disregard the effect which such judicial enforcement will have on the ability of all other Negroes (and other persons proscribed because of their race, color, or religion) to purchase or lease or occupy a house is to shut one's eyes to the facts of life.

The organized purpose to utilize the racial covenants as a substitute for the racial zoning laws which this Court invalidated in *Buchanan, Harmon* and *City of Richmond*—to utilize the device of money judgments as a substitute for the injunction procedure invalidated in *Shelley* and *Hurd*—is dramatized in this case by the *amici* Briefs filed in the names of some 64 "Protective" and "Improvement" Associations of land owners in California, Michigan, Missouri, and the District of Columbia, urging enforcement of the covenant. If this Court should now hold such covenants enforceable through the machinery of the State, Negroes and other persons of ancestry proscribed by prejudice would lose virtually all chance of purchasing hundreds of thousands of covenanted parcels of land still owned by persons who in a passing moment of prejudice or thoughtlessness, often years ago, had signed such a covenant. Despite any change in their personal beliefs resulting from education, religion or increased maturity, these owners would be deterred, by the threat of litigation itself, from making any sales to the proscribed persons. Where covenants, such as the one in this case, state no maximum amount of damages, or where the covenants specify more than a nominal sum as "liquidated damages," few sellers would want to risk the possibility of a heavy judgment imposed by biased jurors who may be imbued with the false notion that Negro occupancy causes depreciation of the real estate values of the community.[4] Indeed, the Missouri *amici* (*Brief of O'Fallon Park Protective Association, et al.*, p. 19) frankly admit: "It is true, as has been suggested, that if the States are permitted to render many

[4] See pp. 73-85, *Consolidated Brief for Petitioners* in *Hurd* v. *Hodge*, *supra*, Nos. 290-291, Oct. Term, 1947, for data, including studies by National Association of Real Estate Boards, showing that Negro occupancy does not cause depreciation of real estate values, and frequently increases such values. *Accord:* Belden Morgan, "Values in Transition Areas: Some New Concepts," *The Review of the Society of Residential Appraisers*, 5-10 (March 1952).

judgments upon proper application against one who has breached a restrictive agreement, the threat of such action may prove a deterrent to the sale of certain real property to members of a racial minority."

True, no colored person may compel a white person to sell if the white owner is unwilling to sell. But the colored purchaser does have a constitutional right to be free from the pressures imposed by State action on persons who, except for such State action, would be willing to sell to him. That right is as great as the constitutional right which an individual has in the freedom of an employer to select employees, unrestrained by arbitrary and discriminatory restrictions which are based on race or nationality and enforced by governmental power. *Truax* v. *Raich*, 239 U. S. 33, 38, 41 (1915); *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944) (discrimination through contract).

Furthermore, the necessary result of judicial enforcement by a money judgment against those white sellers who would regard the judgment as a "cost of doing business," would be an equivalent increase in the sales price which would be required from Negro purchasers, though not from white purchasers, irrespective of whether or not the particular covenant states a fixed or "liquidated" sum of "damages." Such discriminatory economic impact, resulting from the action of the State based solely on race or color, is clearly violative of the constitutional rights of the proscribed purchasers.

Even more pervasive would be the intangible support which the availability of such judgments would afford to racial residential segregation. Not only would the prestige of the courts afford legal and moral sanction to the use of governmental power to enforce such discriminatory covenants, but it would enlist as active proponents of prejudice a large number of people who at one time, even many years ago, signed such agreements either under pressure or without adequate realization of the full import of what they had signed, and have since become neutral or have changed their minds.

The evil effect which the past could have on the future is illustrated by the language of the very covenant involved in this case. It purports to impose damages on the covenantor if the land should "ever at any time" be used or occupied by "persons not wholly of the white or Caucasian race". Under California law, as interpreted by the court below (R. 32-34), the happening of the event (occupancy by persons of Negro ancestry) would, in the absence of the Constitutional protection, have subjected the Respondent to damages even though the event was occasioned by a subsequent owner, as apparently occurred in this case. Thus, if the Fourteenth Amendment did not prohibit the imposition of such damages, every white seller in Respondent's position would have to be *perpetually* on guard against occupancy "ever at any time" by persons who might be within the proscribed class. Otherwise he would be subjected to the threat and the reality of a money judgment. The covenants would thus become a form of blackmail compelling the intensification of prejudice and overt discrimination against racial and religious groups.

IV. The judicial rule of law sought by the Petitioners would unconstitutionally lend government aid to private prejudice.

Essentially, what the Petitioners seek in this case is the formulation of a judicial "rule of law" which by governmental imposition of financial punishment will deter the sales of homes to persons whom prejudiced people want to keep out of the community (except as servants). Such a judicial rule of law would establish the legality of enforced ghetto-ization of America through the use of governmental power. The evil consequences of such a rule of law have been fully demonstrated. See pp. 40-98, *Consolidated Brief for Petitioners* in *Hurd* v. *Hodge*, *supra*. Such a rule of law is no different than the legislative rule of law which this Court unanimously and repeatedly struck down in 1917,

1926 and 1930. It is as violative of constitutional rights as the judicial rule of law which this Court unanimously rejected in 1948.

The Petitioners' faint-hearted suggestion that such a rule of law is required by the Fourteenth Amendment to protect *their* rights as parties to a "contract" has been squarely repudiated by this Court (*Shelley* at 22)—such an argument, clearly, is "a distortion of the policy manifested in that amendment," which was adopted to prevent, not to compel, State action perpetuating discrimination on the basis of race or color. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94 (1945).

Our First President delineated the standard of our government as one "which gives to bigotry no sanction, to persecution no assistance." *Letter of George Washington*, August 1790, *To the Hebrew Congregation in Newport, Rhode Island*, 30 Washington's Letter Books 19. The prohibition of the Fourteenth Amendment, in the spirit of that standard, precludes judicial enforcement of the discriminatory covenant in this case.

We therefore respectfully urge that this Court affirm the decision of the court below, and reject the Petitioners' attempt to establish a judicial rule of law, under which private bigotry and prejudice would utilize governmental power to extend their ability to discriminate.

AMERICAN VETERANS COMMITTEE, INC.
Amicus Curiae

By PHINEAS INDRITZ,
National Counsel;
American Veterans Committee.

April 20, 1953.

Washington, D. C.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

BRIEF OF AMICI CURIAE.

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BRIEF OF AMICI CURIAE.

Counsel for *Amici Curiae,* by consent of the parties hereto, have filed this brief, pursuant to rule 27(9)(a) of the revised rules of the Supreme Court of the United States, in support of the decision of the court below. They are concerned with the attempt being made to restrict the scope of this Court's decision in *Shelley v. Kraemer,* 334 U. S. 1. The organizations that join in this brief are as follows:

American Civil Liberties Union (Southern California Branch).

Los Angeles International Ladies' Garment Workers' Union.

Greater Los Angeles C. I. O. Council.

National Association for the Advancement of Colored People.

Japanese American Citizens' League.

Los Angeles Urban League.

Southern Division, California Cooperative League.

The Christines.

Jewish Labor Committee.

Los Angeles District Council, Jewish War Veterans, U. S. A.

Eagle Rock Council for Civic Unity.

Los Angeles Central Labor Council.

Statement of Interest of Amici Curiae.

The interest of the undersigned organizations and persons in this litigation arises by reason of their belief that there is explicit and implicit in the issues herein grave constitutional questions dealing with the Fourteenth Amendment. Moreover, they are interested and committed to the maintenance of the proposition that all men are created equal and that no state action can be asked to enforce agreements based upon terms of race or color.

Again, they perceive in this litigation important questions of public interest in the congestion of limited residential districts for non-white people, arising as a consequence of compulsory residential segregation. It seems to them also that this case raises the query as to whether an owner of property may be deprived of one of its essentials elements,—the right to dispose of it to a constitutionally qualified purchaser.

Summary of the Argument.

I.

Respondent's rights are directly and immediately involved in this litigation. These rights, including the right to the sound development of the whole community and the right to dispose of property, are protected by the Fourteenth Amendment against judicial action directed toward maintenance of segregation. Such rights cannot achieve full and complete expression where segregation exists. Rights of whites and Negroes are inseparably connected. They are two sides of the same coin. What affects one inevitably affects the other.

II.

Public policy of the State of California denies the use of the courts to enforce agreements designed to promote segregation. There is a clear public policy against discrimination based on race or color. Although the state recognizes such agreements as valid and permits voluntary adherence thereto, it denies the use of its courts for enforcement. An integral part of the public policy against discrimination is the refusal of the state to give active support to segregation agreements.

III.

Even conceding for the purpose of argument that no rights of Respondent are here involved, the state court may properly consider the rights of the Negro population. This is particularly true on the basis of public policy, where the courts have traditionally considered the interests of persons not before it. It is also true where only constitutional (Fourteenth Amendment) objections are involved, because in this case the court is not passing on the validity of a legislative enactment but is being solicited to act affirmatively. On the analogy of the free speech cases, the court may properly consider the social interests involved and need not limit itself to the rights of the particular litigants.

ARGUMENT.

I.

Since Respondent's Rights Are Directly and Immediately Involved in This Litigation, She May Properly Raise the Constitutional Issues.

A. The Right to the Sound Development of the Whole Community.

Counsel for Petitioners and St. Louis *Amici* have asserted as one of their central arguments the proposition that the "Respondent has no standing in this court to protect or assert the rights of the Negro occupants of the real property concerned." This argument ignores the fact that Respondent, although of the white race, has rights and interests of her own which are directly and immediately involved in this litigation.

Residential segregation is harmful not only to the Negroes who are segregated but also to members of the community at large. The social evils resulting from segregation inevitably affect the surrounding community. This view was forcefully expressed by Mr. Justice Traynor of the Supreme Court of California in his separate concurring opinion in *Fairchild v. Raines*, 24 Cal. 2d 818, 834, where he declared that:

"Negroes migrating into urban communities have found barriers at every turn. 'Segregation . . . has kept the Negro occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and plague spots for race exploitation, friction, and riots.'" (Report of the Committee on Negro Housing of the President's Conference on Home Building and Home Ownership, pp. 45 and 46.) The choice lies between the con-

tinuance of such conditions and the expansion of urban Negro districts. Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the *sound development of the whole community*. The courts, as the agencies of the state confronted with the problem of enforcing racial zoning by private agreements, must consider all of the factors that affect the public interest. It is pertinent to recall the words of Judge Cardozo in his concurring opinion in *Adler v. Deegan*, 251 N. Y. 467, 484 (167 N. E. 705, 711): "The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwelling of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole state. Here is to be bred the citizenry with which the state must do its work in the years that are to come. The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women . . . . If the moral and physical fibre of its manhood and womanhood is not a state concern, the question is, what is?"

Further judicial recognition of this view is found in *Perez v. Sharp*, 32 Cal. 2d 711, 725, where the Court stated:

> "The effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice."

Not only is segregation detrimental to the Negro and white citizens involved, but it is also injurious to the

interests of the nation as a whole. The effect of segregation is to keep the races apart and to prevent them from knowing each other. Lack of knowledge leads to suspicion, distrust and conflict and results in further demands for segregation. Thus, a vicious cycle is created, and instead of a unified nation we have a divided one. Such a divided nation is at a disadvantage in its attempt to meet the serious international problems with which we are today confronted.

Such judicial declarations are based upon the findings made over a period of years by sociologists and psychologists[1].

> "Segregation and discrimination have had material and moral effect on whites, too. Booker T. Washington's famous remark that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers." (Myrdal, *An American Dilemma*, vol. I, pp. 643-644.)
>
> "Those who segregate others soon become frightened, insecure people forced to accept and invent prejudice to justify their actions. They become hypocrites who either close their eyes to stark reality or invent slogans to hide fundamental issues. The master classes, no less than the subjected, become victims of the system." (Weaver, *The Negro Ghetto*, p. 270.)[2]

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[1]Deutscher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 261, 267.

[2]See, also, Moton, *What the Negro Thinks*, p. 5; Dollard, *Caste and Class in a Southern Town*, p. 73; Brief of the United States, pp. 55-56, in *Henderson v. The United States of America*, 339 U. S. 816, in which this position is very forcefully presented and supported by numerous authorities.

Where people of different races are free to live and work together, prejudices disappear. They learn to appreciate each other's merits. This has been the experience in housing projects, in the army and in factories.

> "That living or working together on a plane of equality results in the lessening of prejudice was demonstrated by the experiences in the Detroit race riot of June 21, 1943. Although this bloody riot raged through the entire city, competent observers reported no untoward incidents in mixed neighborhoods where whites had lived alongside of Negroes, in the Detroit war factories where integrated employment was the rule, or in Wayne University, in the heart of Detroit, where Negro and white students continued their classes without any friction." (*Annals of the American Academy of Political and Social Science*, May 1951, p. 14.)

These remarks are particularly applicable to the situation in Los Angeles County, in which the present litigation arises. As early as 1944, Mr. Justice Traynor noted the problem arising in this area as a result of the steady migration of southern Negroes.

> "It must be recognized that the steady migration of southern Negroes and the influx of Negroes into urban communities in response to the increasing demands of industry for labor, together with race segregation (see Kennedy, the Negro Peasant Turns Citywards, ch. II, The Causes of Migration, p. 41; Woofter, Negro Problem in Cities, ch. II, The Rapid City Growth, p. 26; Sterner, The Negro's Share, A Study of Income, Consumption, Housing, and Public Assistance, pp. 186-209; Martin, Segregation of Negroes, 32 Mich. L. Rev. 721), have made it impossible for many Negroes to find decent

housing in large centers of population. The report of the Committee on Negro Housing of the President's Conference on Home Building and Home Ownership (1932) page 3, states: 'Cities of the North . . . have shown increases ranging from 10 to 600 per cent. Chicago's Negro population in 1910 was 44,103; in 1930 it had increased to 233,903. Philadelphia's increased from 84,459 in 1910 to 219,599 in 1930, and that of New York . . . from 91,709 to 327,706.' In recent years there has been a large Negro migration into Southern California. The census of 1940 shows an increase of the colored population of Los Angeles from 67,348 in 1930 to 97,847 (Statistical Abstract of the United States, 1942, 78th Congress, 1st Sess., House Document No. 53, p. 20), and the war has accelerated the pace of this migration."

Fairchild v. Raines, supra, pp. 833-834.

Respondent does not live in a social vacuum. The social evils of crime, juvenile delinquency, disease and racial conflict which are the inevitable results of segregation cannot be contained within the Negro ghetto. With explosive force these evils break through the walls and affect the surrounding community in which she lives.

An award of damages against Respondent must necessarily discourage other white sellers from breaching restrictive covenant agreements. The end result is the perpetuation of the ghetto system and its attendant evils. Such judicial action is state action affecting Respondent's rights as well as the rights of the Negro purchasers, and is prohibited by the Fourteenth Amendment.

In *Meyer v. Nebraska*, it was stated that:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man." (262 U. S. 390, 399.)

The liberty thus defined cannot be effectively secured without a sound system of community relations. The rights enumerated cannot be considered in abstraction, but only with reference to the specific social environment in which Respondent lives.

Interrelationships of this character are similar to those considered by the court in *Pierce v. Society of Sisters*, 268 U. S. 510. In that case an injunction was sought against the Governor of Oregon and various other state officials to restrain enforcement of a law requiring parents and others having control of young children to send them to the State's primary schools. Plaintiffs were two corporations owning and conducting private schools. In behalf of the defendants it was contended that the corporations had no right to test the constitutionality of a law merely because it might affect the liberty of others (parents and children) in whom they had no recognized

legal interest. (Similarly, Petitioners here contend that Respondent has no rights of her own involved but appears merely as the champion of the Negro race.) In answer, counsel in the *Pierce* case pointed out that if the liberty of the parents was impaired the constitutional rights of the corporation schools were necessarily abridged, and this position was sustained by the Court.

Obviously, the corporations had no children of their own and therefore the challenged legislation did not directly operate upon them. However, the relation between schools, parents and children being what it is, the corporations' property interests were immediately involved and the Court found that:

> "These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools." (p. 535).

Although the parents were not parties to the action, the Court further found:

> "Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control" (pp. 534-535).

In *Truax v. Raich*, 239 U. S. 33, this Court had under consideration a statute of Arizona requiring employers of more than five employees to employ not less than 80% qualified electors and native-born citizens. Raich, employed as a cook, filed suit against his employer and the attorney general and county attorney, alleging that they intended to prosecute his employer and that to avoid

such prosecution his employer was preparing to discharge him. Here, again, the statute did not in terms apply to the party asserting the unconstitutionality but the Court stated:

> "It is further urged that the complainant cannot sue save to redress his own grievance (McCabe v. Atchison, Topeka and Santa Fe Ry., 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit . . . It is, therefore, idle to call the injury indirect or remote." (P. 38.)

In the same manner, the rights of our Negro citizens cannot be adversely affected without directly affecting the rights of other members of the community. The rights protected by the Fourteenth Amendment include those which are not tangible or corporeal. Thus, in *Sweatt v. Painter*, 339 U. S. 631, the Court found the Negro law school to be unequal to the University of Texas Law School to which only white students were admitted, because the latter possessed *"those qualities which are incapable of objective measurement."* (P. 634, emphasis added.) The Court stressed the importance of "the interplay of ideas and the exchange of views with which the law is concerned" (p. 634).

In defining the rights of residents of a company-owned town, this Court stated:

> "Just as all other citizens they must make decisions which affect the welfare of the community and

nation. To act as good citizens they must be informed. In order to be properly informed, their information must be uncensored."

Marsh v. Alabama, 326 U. S. 501, 508.

A sound system of community relations, which is the only environment in which Respondent's rights can be completely guaranteed, also requires "the interplay of ideas and the exchange of views" between white and Negro. Segregation produces results totally inconsistent with this desired objective.

B. The Right to Dispose of Her Property.

Among the rights guaranteed to Respondent by the Fourteenth Amendment is the right to dispose of her property to a person of color.

Buchanan v. Warley, 245 U. S. 60, 81;

Hurd v. Hodge, 334 U. S. 24;

Phillips v. Naff, 332 Mich. 389, 52 N. W. 2d 158.

It is argued on behalf of Petitioners that this issue is not involved since Respondent "has fully exercised her right to dispose of her property" (Petitioners' Br. p. 27). To assert, however, that one has a constitutional right to dispose of his property to a person of color but that he may only exercise such right by subjecting himself to a suit for damages (as Petitioners contend) is to nullify the right completely. It is obvious that few property owners would be willing to take the risks involved in exercising their constitutional rights to sell to

Negroes under such conditions. The practical result is that their rights are effectively annulled. (*Phillips v. Naff, supra,* p. 401.)

II.

Public Policy of the State of California Inhibits the Use of the State's Courts to Enforce This Agreement.

Although it is clear that such agreements may not contravene the public policy of the State, and therefore voluntary adherence thereto may not be interfered with by the State, the use of the judicial machinery of the State to enforce them violates the public policy of the State.

Similarly, in *Hurd v. Hodge, supra,* this Court reversed the judgment of the United States District Court for the District of Columbia decreeing enforcement of a restrictive covenant. Included as a defendant was Uricolo, *a white real estate dealer,* who had sold some of the properties to Negroes. On certiorari the petitioners in that case contended that this violated the due process clause of the Fifth Amendment. However, this Court did not find it necessary to resolve the constitutional issue. The decision was based upon Section 1978 of the Revised Statutes and the public policy of the United States. It was held that:

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the

public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (Pp. 34-35.)

Although the opinion of the District Court of Appeal of California in the instant case stresses the Fourteenth Amendment, the broad language used therein sufficiently shows that a further ground of opinion was the public policy of the State. Thus, it is declared:

> "No person has the right, nor does the State have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws." (*Barrows v. Jackson,* 112 Cal. App. 2d 534, 554.)

This is particularly true in the light of recent decisions of the Supreme Court of California enunciating a public policy opposed to discrimination on account of race or color.

James v. Marinship, 25 Cal. 2d 721, 740;

Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 286, 290.

In the *James* case, the defendant trade union contended that discriminatory acts of private individuals or organizations were not prohibited by the constitutional provisions, since such provisions were applicable to state action rather than to private action. It further contended

that private acts of discrimination could be prohibited only by state statute and that the existing California statutes forbidding racial discrimination by private persons did not include labor unions. Answering this contention the Court declared, at page 740:

> "The analogy of the public service cases not only *demonstrates a public policy against racial discrimination* but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved." (Emphasis added.)

The doctrine of the *James* case was subsequently reaffirmed in the *Williams* case, where the Court declared, at page 590:

> "Although the relief granted in the *Corsi* case was derived from legislative authority, nevertheless, it is established that, *where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy, the courts have full power to afford the necessary protection in the absence of statute.*" (Emphasis added.)

Inherent in the concept of public policy is the fundamental requirement that the state itself will not lend its assistance to the creation or support of the condition condemned thereby. The public policy of the State of California against discrimination on the basis of color is clear. It necessarily follows, as an element of that public policy, that the courts are closed to those who seek results inconsistent with that policy.

III.

The State Court May Properly Raise an Objection of Public Policy or Constitutional Violation Sua Sponte.

Whether the Court below based its opinion on the ground of the Fourteenth Amendment or on the ground of public policy, it had the power to act on its own motion. This is clearly the law where public policy is involved.

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 267;

Steele v. Drummond, 275 U. S. 199, 204;

Endicott v. Rosenthal, 216 Cal. 721, 728;

17 *C. J. S. Contracts*, p. 670, Sec. 281.

It is also clear that where public policy is concerned, there is no doctrine of estoppel.

Fewel & Dawes v. Pratt, 17 Cal. 2d 85, 91;

Walker v. Harbor Realty & Development Co., 214 Cal. 46, 48;

Doherty v. Bartlett, 81 F. 2d 920, 926, cert. den. 298 U. S. 676;

17 *C. J. S., Contracts*, p. 669, Sec. 279.

Nor can enforcement be secured on the theory of ratification or retention of benefits.

Pacific Wharf & Storage Co. v. Standard American Dredging Co., 184 Cal. 21, 24;

Kessler v. Jefferson Storage Corp., 125 F. 2d 108, 110;

17 *C. J. S., Contracts*, pp. 668-669, Secs. 279-280.

"The rule as to the nonenforcement of illegal contracts is not based upon any consideration for the party against whom the relief is sought, and who may be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. It is not for the sake of a party but for the sake of the law itself, that a court refuses to allow the law to be made use of for the enforcement of illegal contracts, and leaves the parties where it finds them."

6 Cal Jur., Contracts, pp. 153-154, Sec. 107.

This same principle is applicable where the contract itself is illegal *or* where the contract though valid and subject to voluntary adherence is denied judicial enforcement because of the state's general public policy against discsimination.

Where the principle is applicable, it follows that the Court is not concerned with the parties who may be before it in the specific case. The very meaning of public policy embraces the interest of others than the parties.

Beasley v. Texas & P. R. Co., 191 U. S. 492.

Therefore, even if none of Respondent's rights were affected, the Court might properly consider the effect of its action on the Negro occupants who are not before it but are "merely members of a vague and ghostly group" (Br. of St. Louis *Amici,* p. 10). It is completely immaterial that Respondent voluntarily consented to enter into the agreement in question. The Court is not concerned with Respondent alone. It refuses to act *because of a disability in the Petitioner.*

But the Court may also, on its own motion, raise the *constitutional* objection under the same state of facts. In this case the Court is not passing on the constitutionality of a statute enacted by the *legislative* branch of government, *but is being solicited to take affirmative action of its own.* Were the constitutionality of a statute involved we would be governed by the declaration of this Court in *Massachusetts v. Mellon*, 262 U. S. 447, 488.

> "We have no power *per se* to review and *annul acts of Congress* on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of legal rights." (Emphasis added.)

In that case the Court determined that it was being asked

> "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department" (pp. 488-489).

Here, however, no legislative enactment is involved. What Petitioners seek is not the exercise of the "negative power to disregard an unconstitutional enactment" but the affirmative action of the Court in furthering the maintenance of the system of segregation. The situation

is the same as though Petitioners were appearing as lobbyists before the State legislature. It could hardly be contended that the legislature could not reject their unconstitutional demand merely because no Negroes were present in the legislative chamber. Nor is the state court without power to reject their demand merely because no Negroes are parties to this litigation. And in rejecting this demand, the Court is not required "to assume a position of authority over the governmental acts of another and co-equal department" of government.

Even where legislative enactments are involved, in cases involving freedom of speech, this Court has broadly interpreted and applied its powers of review, because of the vital social interest involved. Thus, in *Thornhill v. Alabama*, 310 U. S. 88, the Court held:

> "Proof of an abuse of power *in the particular case* has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165; *Hague v. CIO*, 307 U. S. 496, 516; *Lovell v. Griffin*, 303 U. S. 444." (P. 97, emphasis added.)

The basis of the rule is "an appreciation of the character of the evil inherent in a licensing system" and because the power of the licensor "is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern" (p. 97).

In answer to Alabama's contention that petitioner could not complain of the deprivation of any rights but his own, the Court applied the rule above set forth and proceeded to judge the law on its face.[3]

Conclusion.

Because of the serious social concern with the problem of segregation the Court below properly refused to grant the relief sought by Petitioners. This result is commanded by the Fourteenth Amendment and by the public policy of the State of California. Wherefore, these *Amici Curiae* pray that the judgment of the District Court of Appeal of California be affirmed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
(Southern California Branch),
By A. L. WIRIN and
ABRAHAM GORENFELD,

LOS ANGELES INTERNATIONAL LADIES'
GARMENT WORKERS' UNION,
By BASIL FEINBERG,

GREATER LOS ANGELES C. I. O. COUNCIL,
By FRED OKRAND,

---

[3]The social interest in free speech as a basis of judicial decisions is emphasized by Professor Zechariah Chafee, Jr., *Freedom of Speech in the United States*, p. 34, 1941. See, also, *Day v. Metropolitan Life Ins. Co.*, 11 Cal. App. 2d 681, 683; cert. den. 299 U. S. 560, in which the court indicated that the constitutional questions may properly be considered in any case where "the unconstitutionality of the statute is so apparent on the face that no circumstances can be assumed under which it might have a constitutional operation." And see 16 *C. J. S.*, Constitutional Law, p. 164, as to the present liberal attitude of the courts in permitting the constitutional question to be raised.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
By EVERETTE PORTER,

JAPANESE AMERICAN CITIZENS' LEAGUE,
By SABURO KIDO,

LOS ANGELES URBAN LEAGUE,

SOUTHERN DIVISION, CALIFORNIA COOPERATIVE LEAGUE,

THE CHRISTINES,

JEWISH LABOR COMMITTEE,

LOS ANGELES DISTRICT COUNCIL, JEWISH WAR VETERANS, U. S. A.,

EAGLE ROCK COUNCIL FOR CIVIC UNITY,
By DAVID ZISKIND,

LOS ANGELES CENTRAL LABOR COUNCIL,
By GEORGE E. BODLE,

Counsel for Amici Curiae.

SUPREME COURT, U.S.

FILED

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

against

LEOLA JACKSON,

Respondent.

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

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OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

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against

LEOLA JACKSON,

Respondent.

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

Interest of the *Amici*

This brief is filed with the consent of both parties, on behalf of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, as *amici curiae*.

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the

event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

During the forty-seven years of its existence it has been one of the fundamental tenets of the organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason the American Jewish Committee has on many occasions fought in defense of civil rights even though Jewish interests did not appear to be specifically involved.

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of over 350,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

Each of these organizations has among its fundamental tenets the preservation of the rights guaranteed every citizen by our Federal Constitution.

Organizations such as these, dedicated to the defense of American democracy, cannot stand by silently while our cities and towns are threatened with a flood of restrictive covenants banning occupancy by members of specific racial or religious groups. Therefore, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith joined other civil rights organizations in filing a brief *amici curiae* in this Court in the Restrictive Covenant Cases in 1948.

The dangers to our democratic way of life arising from racial residential segregation are obvious. In 1890 San Francisco sought to achieve racial zoning by adopting an ordinance barring Chinese from living in certain areas of the city. This was followed by the enactment of similar ordinances directed against Negroes in several southern and border cities. In 1917, however, a holding by this court that such ordinances were unconstitutional placed an insurmountable obstacle in the way of efforts to achieve racial residential segregation by legislation. *Buchanan* v. *Warley*, 245 U. S. 60. Thereafter, those seeking to extend the pattern of racial segregation found a new and better means of achieving their goal. They seized upon the ancient and well established device of the private restrictive covenant barring from a neighborhood uses detrimental to the health or comfort of those residing in it, such as glue or soap factories, livery stables, charnel houses, and brothels. They adapted the private restrictive covenant to their needs, revising it to bar—instead of specified uses—occupancy by those racial, religious, or ethnic groups which they consider undesirable. The use of this new technique spread with ominous rapidity, primarily because many state courts upheld and enforced

the new covenants; nearly always the courts failed to distinguish between a covenant barring an obnoxious use and a covenant barring residential occupancy by members of specific racial or religious groups. In 1948 this Court struck down the use of the machinery of state courts to enforce these anti-democratic covenants. Now a new twist has been added. It is claimed that *Shelley* v. *Kraemer* and *Hurd* v. *Hodge* (334 U. S. 1, 24) do not ban actions for damages for breach of racial restrictive covenants.

If racial restrictive covenants can be enforced, either through suits in equity or in law, they can again become instruments of bigotry giving aid and comfort to racial and religious prejudice. Implicit in such a covenant is the anti-democratic and false racist doctrine that undesirable social traits are an attribute not of the individual but of a racial or religious group. Such covenants classify an individual not on the basis of his behavior, but on the basis of his racial origin. They would deny the free choice of a home to a Carver, Cardozo, or Lin Yutang merely because of color or religion. They ascribe social objectionability to unborn generations.

Slums and overcrowding are the inescapable concomitants of restrictive covenants and racial segregation. Death, disease and crime are the notorious spawn of overcrowding. Inter-group stresses and tensions which threaten our democratic state arise inevitably when racial or religious groups find themselves isolated within the community and forced to live in circumscribed segregated areas. Clearly, the growing fusion of interest of America's varied racial, religious, and ethnic groups, the free interchange of varying cultural viewpoints, the develop-

ment of mutual tolerance and confidence among our citizens—requisites for the strengthening and fulfillment of our democracy—are dangerously impeded by restrictive covenants. It is not surprising that the President's Committee On Civil Rights found that "segregation is an obstacle to establishing harmonious relationships among groups" and recommended vigorous action to outlaw restrictive covenants.

Although Negroes have suffered most from the widespread use of restrictive covenants, many other groups including Mexicans, Spanish Americans, Orientals, Armenians, Hindus, Syrians, Turks, Jews, and Catholics have found such covenants barring them from many residential areas in many cities.

The impact of the racial restrictive covenant does not end at the water's edge. In many lands the prestige of American democracy suffers because our practice in the field of race relations does not always square with our ideals. The refusal of judicial support for any kind of enforcement of racial restrictive covenants will remove a powerful propaganda weapon from the hands of democracy's opponents.

The organizations sponsoring this brief are peculiarly alert to the dangers to democracy arising from racial or religious residential segregation. Jewish experience under European despotism gave rise to the word "ghetto". The threat of revival of that institution—implicit in the newest attempt to make racial restrictive covenants a deterrent to free use and occupancy of real property—demands our intercession in this case.

Statement of the Case

The three petitioners are home owners in a Los Angeles residential area. Two of them and the respondent were among the signers of a racial restrictive agreement on October 21, 1944. The third petitioner, although not a signatory of that agreement, is a successor in interest of a signer. The agreement was duly recorded on May 8, 1945.

On February 2, 1950, the respondent sold her home but did not include the proscriptive racial covenant in her deed. Subsequently, Negroes occupied the respondent's former residence and petitioners commenced this action against respondent for damages alleged to have resulted from her failure to incorporate the racial restrictive covenant in her deed of February 2, 1950.

On February 23, 1951, the respondent filed a demurrer to the petitioners' second amended complaint (R. 7-8). On March 26, 1951, Judge Daniel N. Stevens filed a memorandum opinion in the Superior Court of Los Angeles County sustaining the demurrer and dismissing the complaint "without leave to amend" (R. 8-16). Judgment in accordance with that opinion was entered on March 29, 1951 (R. 16).

On August 6, 1952, the District Court of Appeal, Second Appellate District, affirmed the decision of the Superior Court. 112 Cal. App. 2d 534, 247 P. 2d 99 (R. 30-56). A petition for rehearing was filed with the District Court of Appeal on August 20, 1952 and denied on September 4, 1952.

A petition for hearing before the Supreme Court of California was denied on October 2, 1952, and this Court granted certiorari on March 9, 1953.

The Issue Presented

The sole issue presented by this case is whether this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, held that any and all forms of court enforcement of racial restrictive covenants are state action which violates the equal protection of the laws clause of the Fourteenth Amendment or whether this Court intended, in that case, to limit its holding so that only suits in equity for specific performance would be deemed such state action.

Summary of Argument

Shelley v. *Kraemer*, 334 U. S. 1, and the companion cases were intended by this Court to bar any form of judicial proceeding to enforce or compel compliance with racial restrictive covenants. Most lower courts that have been presented with this issue have so interpreted *Shelley* v. *Kraemer*. Whether compliance is sought through an equity suit for injunction against sale to a member of the excluded class or through a law suit for damages for breach of a racial restrictive covenant, it is the judicial machinery and procedures of the state that are invoked and this is "state action" prohibited by the equal protection of the laws clause of the Fourteenth Amendment.

Any narrow interpretation of this Court's decision in the Restrictive Covenant Cases, which would countenance suits for damages, would revive the effectiveness of racial covenants as a tool to perpetrate ghettos, black belts and restricted residential neighborhoods where Americans would be excluded, through the assistance of the courts, on the grounds of race, color, religion or nationality. This would result in a denial of rights protected by the Fourteenth Amendment.

POINT I

A state court may not entertain a suit for damages for breach of a racial restrictive covenant because the court would thereby deny equal protection of the laws in violation of the Fourteenth Amendment.

The relevant portion of the Fourteenth Amendment reads as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This Court has consistently held that the equal protection clause proscribes any and all forms of state action which discriminates on the basis of race or color. *Shelley* v. *Kraemer*, 334 U. S. 1, 14.

The question of the applicability of the Fourteenth Amendment to court action enforcing racial restrictive covenants first came before this Court in 1948 in a series of cases commonly known as the Restrictive Covenant Cases. *Shelley* v. *Kraemer* and *McGhee* v. *Sipes*, *supra*; *Hurd* v. *Hodge* and *Urciolo* v. *Hodge*, 334 U. S. 24. In those cases, this Court held that the equal protection clause of the Fourteenth Amendment barred judicial enforcement of racial restrictive covenants.

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes *action of state courts and state judicial officials*. Although, in construing the terms of the Fourteenth Amendment, differences from time to time have been expressed as to whether particular types of action may be said to offend the Amendment's

> prohibitory provisions, it has never been suggested that *state court action* is immunized from the operation of those provisions simply because the act is that of the *judicial branch of the state government.* (18) (Emphasis added.)

The Restrictive Covenant Cases dealt with petitions seeking injunctive relief for specific performance of racial restrictive covenants. Action by the state courts was involved in the *Shelley* case while action by the Federal District Court for the District of Columbia was at issue in the *Hurd* case. In reversing the lower courts and outlawing the use of "judicial action" to enforce these racial restrictive covenants, this Court said:

> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. *Shelley* case, *supra* (20).

Aftermath of the Restrictive Covenant Cases

One week after this Court established the second rule of *Shelley's* case, it applied it in reversing decisions of the Supreme Courts of Ohio and California which had held racial restrictive covenants enforceable. *Trustees of Monroe Avenue Church of Christ* v. *Perkins,* 334 U. S. 813; *Amer* v. *Superior Court of State of California,* and *Yin Kim* v. *Superior Court of the State of California,* 334 U. S. 813.

Several restrictive covenant cases were pending in various state courts at the time of the *Shelley* decision. On July 16, 1948, some two months after this Court's ruling, the New York State Court of Appeals, by memorandum opinion which simply referred to the *Shelley* de-

cision, reversed a lower court which had granted an injunction against violation of a restrictive covenant. *Kemp* v. *Rubin,* 298 N. Y. 590. In November of the same year, the Supreme Court of Illinois rendered a similar decision in the case of *Tovey* v. *Levy,* 401 Ill. 393.

In December 1948, the Court of Appeals of Maryland had before it two cases involving petitions for specific enforcement of racial restrictive covenants. *Goetz* v. *Smith,* and *Saunders* v. *Phillips,* 191 Md. 707, cert. denied 336 U. S. 967. The plaintiffs argued that the *Shelley* decision did not apply to them because, despite the covenants, Negroes had occupied at least several of the parcels in question for periods of over twenty years. They also pointed out that in the *Shelley* case, the Negro purchaser had had no actual knowledge of the restrictions at the time he made his purchase, while in the cases before the Maryland court, the Negro defendants knew of the restrictions at the time they bought the property.

The Court of Appeals of Maryland rejected all these contentions and relied on *Shelley* v. *Kraemer, supra,* as conclusive authority for the proposition that it was barred from granting the requested injunctions.

In the same month, a Texas appellate court in the case of *Clifton* v. *Puente,* 218 S. W. 2d 272, followed a similar course of action. The covenant there involved barred sale or lease to "persons of Mexican descent" and provided that the land should revert to the original owner in case of violation. In December 1947, the property had been sold to Puente, a person of Mexican descent. Thereupon the original owner, claiming a reversion under the terms of the covenant, sold the same piece of land to the plaintiff, Clifton, who joined with the original owner in

bringing an action against Puente for a declaration that Clifton was the rightful owner of the land. Puente countered by asking the court for an order granting him possession of the property. While the matter was under consideration in the trial court, the *Shelley* decision was rendered. Despite this decision, the plaintiffs pressed their demand that the court cancel the deed by which the property had been conveyed to Puente.

The trial court, on the basis of the *Shelley* decision, dismissed the plaintiffs' action and granted Puente's counterclaim. The Texas Court of Civil Appeals affirmed the decision of the trial court. It rejected the claim of the plaintiff that there was a distinction between cases where the plaintiffs were seeking to enforce a racial restrictive covenant by means of an injunction and the case before the Texas court in which the plaintiff was seeking merely to have the court declare that the covenant was valid and by its provisions entitled him to possession upon breach. In rejecting this contention, the Texas Court of Civil Appeals said:

> It is as much an enforcement of the covenant to deny a person his legal right to which he would be entitled except for the covenant as it would be to expressly command the judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated on the position of a party (alleged to be an ineligible grantee) as a plaintiff or as a defendant. Under the decision of the Supreme Court above referred to [*Shelley* v. *Kraemer*], judicial recognition or enforcement of the restrictive covenant involved here is precluded by the "equal protection of the law" clause of the Fourteenth Amendment. *Clifton* v. *Puente, supra.*

When persons interested in retaining the effectiveness of restrictive covenants to maintain the racial character of residential neighborhoods, found that state courts refused to issue injunctions to enforce them, they searched for other legal technicalities. One of the first such devices was a suit for damages for violation of the restrictive covenant. The case of *Weiss* v. *Leaon* which arose in Kansas City, Mo., and was decided by the highest court of the State of Missouri on December 12, 1949, originated as a suit for both an injunction and damages brought by a group of white signers of a restrictive covenant against other white signers, who were planning to sell to Negroes. The plaintiffs, seeking enforcement of the covenant, made the prospective Negro buyers co-defendants. The trial court rejected the request for an injunction on the basis of *Shelley* v. *Kraemer*. It also rejected the plaintiffs' request for damages. The Supreme Court of Missouri, on appeal, ruled that the trial court's refusal to enforce the covenant by injunction was proper, but that a suit for monetary damages brought against the white sellers for breach of a restrictive covenant was not barred by this Court's ruling in the *Shelley* case. The Supreme Court of Missouri sent the case back to the trial court for a determination of the damages, if any, suffered by the plaintiffs. *Weiss* v. *Leaon*, 359 Mo. 1054. The plaintiffs, apparently satisfied that the Missouri Supreme Court's ruling (that a damage suit could be brought) would have the deterrent effect sought, have not returned to the trial court for an assessment of damages.

A somewhat different device to evade the impact of *Shelley* v. *Kraemer* was used in Oklahoma. An owner of land subject to a restrictive covenant against Negroes, sold the land to a white person who in turn sold it to

Negroes. White owners of other lots covered by the covenant sued to have the sale set aside. They alleged a conspiracy to damage them by destroying the restrictions, charging as co-conspirators the original white sellers, the white intermediary seller and the Negro purchasers. Plaintiffs' claim for damages was thus based on *conspiracy* which under state law constitutes a tort giving rise to an action for damages. Plaintiffs claimed as damages the costs they had incurred in connection with the conclusion of the restrictive covenant and the alleged depreciation of their land resulting from the sale to a Negro.

The trial court dismissed the action in its entirety on the authority of *Shelley* v. *Kraemer*. The Oklahoma Supreme Court upheld the trial court's refusal to set aside the sale, but reversed the ruling that there could be no claim for damages based on conspiracy. The court argued that *Shelley* v. *Kraemer* had ruled a racial restrictive covenant a "valid contract" and that, therefore, an agreement entered into by two or more people to bring about a violation of such a contract could constitute the tort of conspiracy giving rise to an action for damages. Hence the Supreme Court of Oklahoma ordered the trial court to uphold that portion of the complaint claiming damages for conspiracy. *Correll* v. *Earley*, 237 P. 2d. 1017.

Despite the different bases of the damage claims in both cases (breach of contract in Missouri, tort for conspiracy in Oklahoma) the rationale of both decisions is very similar. Both courts ruled that a restrictive covenant was a valid contract—though unenforceable by court action for specific performance—and that therefore the damage resulting from its breach was recoverable.

On the other hand, the United States District Court in the District of Columbia held, on October 5, 1950, that *Shelley* v. *Kraemer* and *Hurd* v. *Hodge* barred an action for damages for breach of a racial restrictive covenant, even though the covenant itself, as in this case, specified that damages were assessable in the event of breach. *Roberts* v. *Curtis*, 93 F. Supp. 604. In dismissing the action, Judge Holtzoff stated that he construed "the holdings of the Supreme Court [in *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*] as withholding any judicial assistance for enforcement of such restrictive covenants."

On January 30, 1951, the Circuit Court of Wayne County, Michigan, granted a motion to dismiss a suit brought to collect $5,000 damages for breach of a racial restrictive covenant. The plaintiffs and defendants in this case were owners of adjoining lots subject to the covenant. The defendants had sold their property to Negroes in disregard of the covenant.

In dismissing the complaint, Circuit Judge Frank B. Ferguson relied on the *Shelley* decision and ruled that, under it, racial restrictive covenants could not be enforced by state courts. The court also cited a number of Michigan cases holding that, where two persons enter into a contract based upon certain assumptions as to their legal rights, and are mistaken in those assumptions, the contract is void and will be set aside upon application to the courts. Pointing out that the racial restrictive covenant involved in this action was a contract based on the assumption that an injunction could be obtained against its violation, the court held that the covenant upon which the suit was based was unenforceable and that the suit must, therefore, be dismissed.

The judgment of the Circuit Court was affirmed by the Supreme Court of Michigan on the authority of *Shelley* v. *Kraemer*. The court said:

> If the sale of property subject to a reciprocal restrictive covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed and also to place a burden on the right of an owner to sell to a purchaser of his own selection. *Phillips* v. *Naff*, 332 Mich. 389.

In an interesting case, an effort at intimidation of a white seller came to the attention of the Circuit Court of Wayne County, Michigan. That court quickly granted an injunction to the plaintiff who had sold property to Negroes in defiance of a racial restrictive covenant. The injunction was directed against a group of persons who had picketed the plaintiff's home and office denouncing him for selling "white" property to Negroes. In granting the injunction the court ruled that the picketing was unlawful interference with the rights of the plaintiff to dispose of his property to any purchaser. *Brock* v. *Murphy*, January 11, 1951, opinion by Circuit Judge Chester P. O'Hara.

The Issue Reaches This Court.

Now, five years after this Court's historic decision in the Restrictive Covenant Cases, it has before it a case involving the constitutionality of an action in a state court for damages for breach of a racial restrictive covenant. This case arises on a demurrer to the complaint. The material facts alleged in the complaint, and taken as true for purpose of this appeal, are as follows: On October 21,

1944, two of the three petitioners, a grantor of the third petitioner and the respondent, the then owners of four parcels of realty in Los Angeles, entered into a written agreement in which all the parties bound themselves and their successors by a continuing covenant that no part of their realty was to "be used or occupied by any person or persons not wholly of the white or Caucasian race." It was further agreed that this racial restriction should be included in "all papers and transfers" of the properties in question. The agreement was duly recorded on May 8, 1945. On February 2, 1950, the respondent here executed and recorded a deed by which she conveyed one of the lots covered by the agreement but she omitted from that deed the restrictions contained in the agreement of October 21, 1944. Several months later, the respondent moved out of the house on the property conveyed and thereafter it was occupied by Negroes. The complaint alleges that the respondent moved out of the house she conveyed "in order to permit persons known to her to be other than [of] the Caucasian race to move into and occupy said house, and with the intention that persons not of the Caucasian race should move into and occupy said house." (R. 4) The petitioners' claim for damages is predicated upon (1) respondent's failure to incorporate the racial restrictive covenant in her deed, and (2) the non-conforming occupancy after respondent had signed the 1944 agreement.

We have here a respondent who was herself a subscriber to the restrictive agreement in question and who knowingly violated her obligations under that agreement. No claim can be made in this case that the agreement was imposed upon the respondent by others. This is not an action for damages against a Negro. In a sense, therefore,

it can be argued that this case involves a moral obligation voluntarily assumed by the respondent and wilfully disregarded by her with knowledge of the possible consequences of her conduct.

It is respectfully submitted that none of these facts are material. The decisions of this Court in the Restrictive Covenant Cases are sound and controlling. Here, as there, petitioners seek to invoke the aid of the judicial branch of the state government to enforce a racial restrictive covenant. Here, as there, a decision in the petitioners' favor would limit the freedom to acquire and occupy real property of non-Caucasians, Negroes, Japanese Americans, Chinese Americans, American Indians, possibly Mexican Americans, and any other racial, religious or nationality group which some timid grantor might believe, or be advised by a cautious lawyer, would subject him to a suit for damages under similar agreements. Here, as there, a decision in favor of petitioners would limit the right of a grantor to dispose of his property without regard to the race, religion or nationality of the grantee.

Damage Suits Are Means for Enforcing Contracts.

It is elementary that a damage suit is one of several ways in which a court may enforce compliance with a binding contract. In fact it is the usual, and frequently the sole, remedy for breach. The object of the assessment of damages is to put the injured plaintiff in as good a position as he would have had if the contract had been fully performed. Damages are merely "the judicial method of satisfying the contract." *Campbell Building Co.* v. *State Road Commission*, 95 Utah 242, 70 P. 2d. 857, 862; *Horn* v. *Matagorda County (Texas)*, 213 S. W. 934, 935. Clearly, therefore, actions for damages are the judicial

procedures designed to secure for a party injured by breach of contract, precisely what he bargained for or a money equivalent so that he would "be placed in the same situation . . . as if the contract had been performed." *Robinson* v. *Harmon*, 1 Ex. 850, 154 Eng. Rep. 363. Specific performance, on the other hand, is the exceptional remedy, available only where damages for breach of contract are an inadequate remedy.

The instant action, to enforce the original covenant by a damage suit, like an action for specific performance, is intended to maintain the pattern of racial exclusion which was the purpose of the agreement sued on. In other words, the damage suit here is predicated upon the power and sanction of the state courts to compel compliance with the restrictive agreement entered into by the parties in 1944.

If an action for damages is maintainable, property owners obviously will refrain from selling to members of the excluded class. A threat of legal liability in damages can have but one effect—to compel all parties owning land subject to the covenant to obey its terms. As Mr. Justice Holmes said in his dissent in *Bailey* v. *Alabama*, 219 U. S. 219:

> Any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. (246)

Judicial enforcement by assessment of damages entails much of the standard machinery of the courts. A naked judgment for damages does not end the involvement of the state acting through its judiciary. Further coercive action may be, and normally is, invoked. A money judgment is docketed by the Clerk of the Court, thereby becoming a lien on real property. Execution is issued, involving ac-

tion by the marshal or sheriff. If execution is returned unsatisfied, other proceedings supplementary to judgment are available through the court. Examination of the judgment debtor to disclose assets is a standard supplementary proceeding supervised by the court. The court's power to punish for contempt is available to the judgment creditor in such proceedings. If property of the judgment debtor is found, the state, through its sheriff or marshal, may levy on it. Execution against property, and in some cases against the person, of the judgment debtor, is available. Many state civil practice acts also provide for warrants of attachment and garnishment of salaries or income. Clearly, then, it is no less an exercise of state power when property is seized and sold by a sheriff or marshal to satisfy a judgment for damages, or when any of the other supplementary proceedings are resorted to, than when the power of a court of equity is invoked to compel specific performance of the terms of an agreement. Whether a racial restrictive covenant is enforced by a suit in equity or in law, "the full panoply of state power" is available to the victor to enforce the agreement.

> The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. [*Bridges* v. *California*, 314 U. S. 252] Nor is the Amendment ineffective simply because the particular pattern of discrimination which the state has enforced, was defined initially by the terms of a private agreement. *State action*, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to *exertions of state power in all forms*. *Shelley* v. *Kraemer*, 334 U. S. 1, 20. (Emphasis added.)

In *Buchanan* v. *Warley*, 245 U. S. 60, and *Harmon* v. *Tyler*, 273 U. S. 668, this Court upheld "the right of white sellers to dispose of their properties free from restrictions as to potential purchasers based on consideration of race or color". *Shelley* case, *supra*, 12. If this Court should now hold the respondent liable in damages for permitting occupancy of the covenanted property, it would impair her right to sell her property free from such improper restrictions. It would be permitting the use of state machinery to enforce a "duty" not to sell to colored purchasers or permit use by non-Caucasians, and to the respondent, and others similarly situated, it would be immaterial whether that "duty" is enforced by the threat of injunction or liability to pay money damages.

In this connection, it is noteworthy that throughout the unanimous opinion in *Shelley* v. *Kraemer*, *supra*, this Court never once used the phrase "specific performance" or "injunctive relief". It spoke in terms of "judicial action", "action of state courts," "judicial enforcement" and "court enforcement." Only those lower courts, which have sought to narrow the impact of this Court's holding and to find ways of evading it, have made use of the fact that the Restrictive Covenant Cases involved suits for specific performance. This Court, on the other hand, went to the nub of the matter and dealt with it as a problem of state action to force compliance with racial restrictive agreements.

Social Consequences of Enforcing Racial Restrictive Covenants

The new rule of *Shelley's* case is as important in the development and growth of our democratic theory as the old rule of *Shelley's* case was in the development of the

Anglo-Saxon law of real property. In *Shelley v. Kraemer*, this Court denied to the forces of bigotry, discrimination and "exclusiveness" a weapon which they were using successfully to create the racial and religious slums and ghettos typified by our Harlems and our West Coast "Chinatowns" which are duplicated in many, many cities of the country. An informal survey conducted by James N. Rhea and reported in a series of feature articles entitled "Bulge In The Color Line" in the Providence, R. I., *Journal Bulletin* commencing March 24, 1953, and continuing to the present (the thirteenth article in the series appeared April 6, 1953), reveals that as a result of the decision of this Court in the Restrictive Covenant Cases, thousands of Negroes have been able to purchase and occupy homes in neighborhoods previously barred to them by restrictive covenants. While Negroes have not yet achieved complete equality in the opportunity to acquire and occupy private homes (Milwaukee *Journal*, December 19, 1951), the process of integration of racial and religious groups in housing has taken a definite spurt forward in the last five years. *See*: Bibliography in "Open Occupancy In Public Housing", Public Housing Administration, Housing & Home Finance Agency, U. S. Gov. Printing Office, Washington, D. C. (1953), 26-27; Abrams, Charles, "Housing", American Jewish Year Book (1950), 82-88. *See also*: Morris, John D., special report to *The New York Times*, December 19, 1949, describing the reaction of the Federal Housing Administration to the decision of this Court in the Restrictive Covenant Cases.

An inevitable consequence of racial segregation in housing is discrimination in employment, education, places of public accommodation, and health and welfare services. The result is to create and intensify feelings of resentment,

hostility and frustration among the excluded groups. Community friction and conflict follow. Policies of housing segregation lead also to overcrowding which creates slums, juvenile delinquency and other social evils which our American way of life must always seek to reduce and eliminate. The decision of this Court in the Restrictive Covenant Cases made possible an effective onslaught on housing segregation and discrimination. If this Court, by its decision in this case, narrows and undermines the impact of its earlier decision, the progress we are now making will be ended and our country may once again revert to the establishment of more ghettos and black belts.

The President's Committee on Civil Rights, in its famous report, recognized the significance and fundamental role of the enforceable racial restrictive covenant in this context. The Committee recommended:

> The enactment by the states of laws outlawing restrictive covenants;
>
> Renewed court attack, with intervention by the Department of Justice, upon restrictive covenants.
>
> *To Secure These Rights*, U. S. Gov. Printing Office, Washington, 1947, 169.

That recommendation was predicated upon the following analysis:

> The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances; under present conditions, when severe housing shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation. *Ibid.*

The Committee's suggestions in this respect were put into effect. The battle was won. The counterattack must be defeated.

Conclusion

For all of the reasons urged herein and to aid our Country, which is now engaged in an ideological world conflict in which the practices of our democracy are the subject of close scrutiny by our friends and foes abroad, this Court cannot afford, nor will the world permit us, to rest upon democratic pretensions unrelated to reality. All attempts to enforce racial restrictive covenants, by suits for damages or by any other device conceived by resourceful lawyers seeking to evade the mandate of this Court in *Shelley* v. *Kraemer* and *Lurd* v. *Hodge*, should be rejected.

The decision of the District Court of Appeal of the Second Appellate District of California should therefore be affirmed.

Respectfully submitted,

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Dated: April 21, 1953.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

v.

LEOLA JACKSON.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICUS CURIAE*

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BRIEF OF NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The National Community Relations Advisory Council (hereinafter referred to as the NCRAC) is a coordinating body for a number of national and local Jewish organizations concerned with community relations. This brief is submitted in behalf of the following NCRAC member organizations:

American Jewish Congress
Jewish Labor Committee
Jewish War Veterans of the United States
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of America
Akron Jewish Community Council
Jewish Community Relations Council for Alameda and Contra Costa Counties, California
Baltimore Jewish Community Council
Community Relations Committee of the Jewish Federation of Camden County, N. J.
Cincinnati Jewish Community Council
Jewish Community Federation, Cleveland, Ohio
Detroit Jewish Community Council
Jewish Community Council of Essex County, New Jersey
Community Relations Committee of the Hartford (Conn.) Jewish Federation
Indiana Jewish Community Relations Council
Indianapolis Jewish Community Relations Council
Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City
Community Relations Committee of the Los Angeles Jewish Community Council
Milwaukee Jewish Council
Minnesota Jewish Council
New Haven Jewish Community Council
Philadelphia Jewish Community Relations Council
Jewish Community Relations Council, Pittsburgh
Jewish Community Council, Rochester
Jewish Community Relations Council of St. Louis
San Francisco Jewish Community Relations Council
Jewish Community Council of Greater Washington (D. C.)
Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio

The member organizations of the NCRAC have for many years concerned themselves with the civil, political,

economic and religious rights of Jews and of all groups whose members are threatened with persecution, discrimination or humiliation because of race, religion, color, national origin or ancestry. The special interest of the Jewish people in human rights derives primarily from an immemorial tradition which from the beginning has proclaimed the common origin and destiny of all mankind and has affirmed under the highest sanctions of faith and human aspiration the sanctity of every human being and the common and inalienable rights of all men. The Concern of the NCRAC members in discrimination in housing has been expressed by the publication of a handbook, "Equality of Opportunity in Housing" (June, 1952) which declares (at p. 3):

> "Discrimination in housing undermines the dignity that is the birthright of every man, woman and child. It squanders our human and social resources, fans tensions that destroy our national unity and presents powerful propaganda weapons to our enemies. It is unjust, uneconomic and indefensible. Its elimination is long overdue."

The racial restrictive covenant, barring members of minority groups from access to housing available to others, was long the most widely used device for perpetuating racial neighborhood restrictions. This Court's ruling in 1948 that the Constitution bars enforcement of these covenants was therefore widely hailed as one of the great landmarks of civil freedom and equality. To thousands of minority group families, it meant actual release from galling restrictions and enabled them to buy homes in areas previously closed to them.

The present case represents an attempt to turn the clock back by restoring to the restrictive covenant some

of the coercive effect that it was formerly given by the courts. The NCRAC and its constituent organizations are confident that this Court will reject this attempt to salvage a repudiated instrument of racial and religious discrimination.

Statement of the Case

Petitioners here seek review of a judgment sustaining respondent's demurrer to petitioners' complaint seeking damages for violation of a restrictive covenant, running with the land, prohibiting occupancy of certain property by any person not wholly of the "white or Caucasian race."

The complaint was filed in the Superior Court of Los Angeles County. It alleged that the three petitioners and the respondent, on February 2, 1950, were each owners of parcels of land in Los Angeles covered by a restrictive covenant recorded in May 1945 (R. 1-2). The covenant provided that if any parcel were ever occupied by a person not wholly of the "white or Caucasian race," the owner who covenanted as to that lot, or his successor in interest, would be liable in damages to the other owners (R. 3). Respondent sold and conveyed her lot to others on February 2, 1950 and moved out of the property on September 3, 1950, allegedly in order to permit persons not of the Caucasian race to occupy it; such persons did occupy it on and after September 4, 1950 (R. 4-5). As a result of respondent's violation of the contract, petitioners were allegedly damaged in the total sum of $11,600 (R. 5). Petitioners prayed damages, costs and further just relief (R. 6-7).

Respondent demurred to the complaint on the ground that it stated no cause of action because entertainment of the suit would deny respondent equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment (R. 7-8). The Superior Court issued a judgment (R. 16) and opinion (R. 8-16) sustaining the demurrer. On appeal, the District Court of Appeal affirmed (R. 30-56). After denial of a petition for rehearing by the District Court of Appeal (R. 17-19), petitioners' petition for hearing by the Supreme Court of the State (19-30) was denied by that court (R. 58). Petitioners thereupon filed their petition for writ of certiorari.

The Questions to Which This Brief Is Addressed

The sole issue in this case is whether an award of damages by a state court for violation of a racial restrictive covenant is prohibited by the Fourteenth Amendment to the United States Constitution. We concur in and do not here repeat respondent's argument that such an award of damages is barred by the Constitution because it constitutes enforcement of a racially discriminatory agreement. We address ourselves to two additional arguments that raise the following questions:

1. May the outcome of state judicial action be made to depend on race?

2. Does the award of damages for breach of discriminatory contracts constitute discrimination by the state because it necessarily tends to compel compliance with such contracts?

Argument

The covenant that petitioners invoke here cannot be enforced by injunction since it is based on race, "simply that and nothing more." *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948). We submit that enforcement of the covenant by an award of damages is equally barred by the *Shelley* decision.

Petitioners urge that an award of damages does not effectuate racial discrimination because it leaves the Negro purchaser in possession of the property and merely adjusts rights between the white seller and his fellow white covenantors. On any theory, an award of damages for breach of contract is a form of enforcement of the contract. The *Shelley* case plainly barred any state enforcement of a discriminatory contract. The decision speaks throughout of "enforcement" generally, not of the particular form of enforcement there invoked. Hence, all court action is barred on a contract which, like this one, is discriminatory on its face.

That aspect of the case, however, is fully treated in respondent's brief. We therefore confine this brief to two additional considerations which, we believe, reenforce the broad ban of the *Shelley* decision.

POINT ONE

State judicial action violates the Fourteenth Amendment to the United States Constitution if its outcome is made to depend on race.

An award of money damages for violation of a racial restrictive covenant requires the courts to take legal notice of race and to adjudicate legal consequences on the basis of race. If a vendor sells to one person he is not required to respond in damages to his fellow covenantors; if he sells to another, an award of damages may be made. The factor determining whether the seller is liable in damages is the color of the buyer's skin. This means that the state, acting through its judiciary, is shaping its action on the basis of race and imposing legal consequences for a difference in race. This, we submit, neither the Federal government nor state governments may constitutionally do. While they may under some circumstances recognize the existence of racial differences, they may not attribute legal consequences to the constitutionally irrelevant fact of birth.*

We believe that this principle is required by the terms of the Fourteenth Amendment that prohibits state action denying "equal protection of the laws." The law is not applied equally when the outcome of a court proceeding depends on race. It is for that reason that this Court

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* We recognize that in the Japanese Exclusion Cases (*Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944)) this Court did permit governmental action based on race. We believe that those cases were wrongly decided. In any case, they permit exceptions to the broad principle stated above only in the extreme case of war and threatened invasion.

early declared, in *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1880), "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

It follows from this that the courts cannot entertain the argument that an award of damages in this case would operate only to compensate those who have sustained an alleged loss because of respondent's failure to comply with discriminatory restrictions. Petitioners have suffered no loss of which the courts may constitutionally take notice. Any reliance on alleged differences in the monetary value of property in racially restricted and racially open neighborhoods must be based on the false premise that the power of the state can be invoked to perpetuate racial distinctions and to preserve values based on such distinctions. Since the covenantors may not demand such action by the state, they have no rightful basis upon which to build any difference in value.

This, we submit, is implicit in the decisions of this Court that condemned ordinances designed to preserve separate white and Negro neighborhoods under the guise of "zoning." *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930). These cases, of course, did not generally condemn ordinances designed to enhance property values. There is no question that a municipality may enact ordinances for the protection and preservation of legally recognized property values. The decisions, by refusing to permit racial zoning, declared in effect that

there was no property right in the maintenance of racially segregated neighborhoods that the state, by zoning or by judicial action, could protect.

We recognize that, in urging this Court to condemn all governmental imposition of legal consequences upon the basis of race, we are asking it to go further than it has heretofore gone. Yet this Court has long recognized that, under the First Amendment, legal consequences may not be created on the basis of differences in religion and that government in the United States, by its very nature, "is necessarily undenominational." *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908). Under our constitutional system, religion has from the very beginning been declared to be beyond the "cognizance" of government. Madison's Memorial and Remonstrance, annexed as an appendix to Mr. Justice Rutledge's dissent in *People ex rel. Everson* v. *Ewing*, 330 U. S. 1, 63 (1947). We respectfully urge that, at least since the adoption of the Fourteenth Amendment, race is beyond the cognizance of government and that the time has come for this Court to declare that proposition and make it explicit.

POINT TWO

An award of damages for breach of a racially discriminatory contract constitutes denial of equal protection of the laws by the state because it necessarily tends to compel compliance with such contracts.

If the courts were open to suits for damages against those who refuse to give effect to oppressive covenant restrictions, the threat of court process would act as a continuing restraint—a restraint upon free, non-discriminatory sale of homes that would be imposed by public sanction. For constitutional purposes, it makes no difference that the restraint would be imposed on those who desire to sell their property to the minority group buyer rather than on the buyer himself. No one would defend the constitutionality of a statute that penalized persons who employed Negroes or Jews, even though the injured group would not directly feel the rod of "state action." Indeed, just such a statute, directed against aliens, was stricken down by this Court in *Truax* v. *Raich*, 239 U. S. 33 (1915).

Buchanan v. *Warley*, 245 U. S. 60 (1917) presented a situation even closer to the instant case. The white plaintiff there had contracted to sell land to the Negro defendant. The plaintiff sued for specific performance of the contract. The Negro defendant set up as a defense an ordinance which, if valid, would have prohibited his occupancy of the property because of his race. This Court held the ordinance unconstitutional, despite the fact that the person regulated by the ordinance was white and the only Negro in the case was asserting its validity. It was

argued that the white plaintiff could not raise the constitutional issue because that could be done only "by those whose rights are directly affected by the law or ordinance in question" (245 U. S. at 72). The Court found this requirement satisfied by the fact that the ordinance interfered with the property rights of the white seller (*Id.*, at 72-73). It then went on to condemn the ordinance because it impaired "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color . . ." (*Id.*, at 81).

The *Buchanan* case plainly establishes that the Constitution guarantees to respondent here and to all property owners the right to sell their property to members of minority groups, free of restraint by state action. It is irrelevant that the law suit here is by a white person against another white person and does not directly affect the ownership or occupation of the parcel in question by Negroes. The effect of this form of state action is to restrain the sale of property by whites to Negroes. Hence, it is within the prohibition of the Fourteenth Amendment.

It may well be argued that the mere threat of court process—any kind of court process—is a deterrent upon action. "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death." ("The Deficiencies of Trials to Reach the Heart of the Matter", Learned Hand, 3 Lectures on Legal Topics 89, 105 (1926).) In this case the white seller has been sued by three of her former co-covenantors for a sum totalling $11,600. If this suit were successful, she would be open to further suits by other owners of the parcels covered by the covenant. Her case would stand as a grim warning to other property owners of what they could

expect from the courts if they presume to ignore discriminatory restraints.

Respondent here is faced with more than the mere harrassment of legal process. The state is being asked to force her to pay damages because of conduct that the state may not restrain. This Court is being asked to sanction a rule of law that would restrain for the future other property owners situated as respondent was. To say that no restraint by "state action" is involved is to misconceive the effect if not the purpose of our system of contract law.

Primitive legal systems may give no effect whatever to agreements, leaving the parties to voluntary compliance. Our legal system, however, does enforce contracts. In the words of Professor Cohen, "Contract law is commonly supposed to enforce promises." ("The Basis of Contract," Morris R. Cohen, 46 Harvard Law Review 553, 571 (1931).) The "contract law" to which he refers plainly includes those rules that require the payment of damages when a contract is violated. The law is concerned not only with what Professor Llewellyn calls the "hospital cases" that require direct court action but also with the multitude of everyday transactions that are shaped by the courts' decisions. ("What Price Contract?". K. N. Llewellyn, 40 Yale Law Journal 704, 725, note 47 (1931).)

We believe that it can be shown that the law provides for damages in large part for the very purpose of making them unnecessary by inducing general compliance. Even if that is not the purpose of the rule, it is certainly its effect. Thus the Restatement of the Law of Contracts, while formulating a general rule that damages are meas-

ured by their remedial effect only, recognizes nevertheless that "All damages are in some degree punitive and preventive . . ." (Restatement of the Law of Contracts, Section 342, Comment a, Vol. I, page 561). Justice Holmes similarly recognized that "Any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine" (dissenting in *Bailey* v. *Alabama*, 219 U. S. 219, 246 (1911)).

Moreover, even within the "remedial" theory of contract damages, the law is compelled to make a choice of the extent of the remedy. That choice is guided by considerations of the relative deterrent effects. A classic analysis of the theory of damages makes this clear. In "The Reliance Interest in Contract Damages," L. L. Fuller and Wm. R. Perdue Jr., 46 Yale Law Journal 52 (1936), the authors point out that the law gives the disappointed promisee more than the damage he has suffered by entering into a contract that was later violated. It remedies also his "expectation interest," that is, what he would have gained from the contract had it been performed, even where that gain is one he would never have had if there had been no contract. Analyzing "the reasons which underlie (or may underlie) the enforcement of promises generally" (at 53), the authors explain the choice of the higher measure of damages as follows (at 61):

> "Since the expectation interest furnishes a more easily administered measure of recovery than the reliance interest, it will in practice offer *a more effective sanction against contract breach.* It is therefore possible to view the rule measuring damages by the expectancy in a quasi-criminal aspect, its purpose

being not so much to compensate the promisee as to penalize breach of promise by the promisor. The rule enforcing the unrelied-on promise finds the same justification, on this theory, as an ordinance which fines a man for driving through a stop-light when no other vehicle is in sight." (Emphasis supplied.)

Plainly then, the determination of the measure of damages is based on preventive considerations:

"It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic." (*Ibid.*)

Similarly, Professor Cohen has recognized as at least "one phase" of contract law, "strengthening the security of transactions by enabling men to rely more fully on promises" (*op. cit. supra,* at 584). He concludes (*Id.,* at 585-586):

"It is an error then to speak of the law of contract as if it merely allows people to do things. The absence of criminal prohibitions will do that much. The law of contract plays a more positive role in social life; and this is seen when the organized force of the state is brought into play to compel the loser of a suit to pay or to do something. Doubtless most people live up to their promises or agreements either through force of custom or because it is in the long run more advantageous to do so. But there can be no doubt that the possibility of the law's being invoked against us if we fail to do so is an actual factor in the situation."

Dean Pound considers the damage award as one force, and often the only force, used by the law to obtain observance of the interests it seeks to protect.

> "Law secures interests by punishment, by prevention, by specific redress and by substitutional redress; and the wit of man has discovered no further possibilities of judicial action. . . . Hence, in the great majority of cases substitutional redress by way of money damages is the only resource, and this has been the staple remedy of the law at all times." ("The Limits of Effective Legal Action," Roscoe Pound, III American Bar Association Journal 55, 67 (1917).)

The law does not, however, enforce all agreements. Some are declared illegal and the law may not only withhold enforcement but prevent performance. Many others are simply unenforceable, most commonly because they are so informal that it is not regarded as desirable to use the powers of the state to hold the promisor to his word. In the present situation, enforcement must be withheld because of a constitutional command against the use of "the full coercive power of government to deny . . . , on the grounds of race or color, the enjoyment of property rights. . . ." (*Shelley* case, *supra*, 334 U. S. at 19).

The essence of the *Shelley* decision is its distinction between "Participation of the State . . . in the enforcement of the restrictions" and "voluntary adherence to their terms" (*Id.* at 13). This of course is the same distinction made by Professor Cohen between a rule that "merely allows people to do things" and one that uses "the organized force of the state." Racial restrictive covenants would necessarily bear "the clear and unmistakable imprimatur of the State" (*Id.* at 20), if they were made the basis for invoking court process, for judicial

proceedings to determine whether parties have complied and for damage awards where the courts find they have not. Certainly it could not then be said that "the States have merely abstained from action" (*Id.* at 19).

If this Court upholds the suit for damages in this case, racial restrictive covenants will continue to prevent the free sale of property to minority groups; they will do so because of restraints imposed by state action. We respectfully submit that this outcome is plainly barred by this Court's decision in the *Shelley* case.

CONCLUSION

It is respectfully submitted that the decision below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 517.

OLIVE B. BARROWS, RICHARD PIKKAR and M. M. O'GARA,

Petitioners,

vs.

LEOLA JACKSON,

Respondent.

Petition for Rehearing After Hearing and Decision on the Merits on Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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Respondent.

Petition for Rehearing After Hearing and Decision on the Merits on Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners pray that a rehearing be granted to review the decision of this Court rendered June 15, 1953, in the above entitled cause.

I.

Statement of the Case.

On or about the 21st day of October, 1944, petitioners Barrows [R. 1] and O'Gara [R. 2] and the ancestor in title of petitioner Pikkar [R. 2], and respondent Leola Jackson [R. 2], each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and

caused to be recorded an "agreement imposing restrictions" [R. 2]. By the terms of said agreement each of the signers promised and bound himself, his heirs, executors, administrators, successors and assigns, by a continuing covenant, that no part of his said real property described therein should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race [R. 3]. By the terms of said agreement each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [R. 3].

On or about February 2, 1950, respondent, Leola Jackson, and one Dorothy May Grace, executed a grant deed to Pearnell Smalley and Florine Smalley [R. 4]. Respondent, Leola Jackson, failed to incorporate in said deed the restrictions contained in said agreement against use and occupancy by persons not wholly of the white or Caucasian race, which failure constituted the first breach of respondent's contract complained of by petitioners [R. 5].

On or about September 4, 1950, persons not of the white or Caucasion race moved into and began to use and occupy the property as to which respondent had contracted that it would never at any time be used or occupied by persons not of the white or Caucasian race [R. 4]. Said use and occupancy on or about and after the 4th day of September, 1950, constituted the second breach of respondent's contract complained of by petitioners. As a result of the breaches of contract, and each of them, petitioners have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [R. 5 and 6]. Respondent's demurrer was sustained without

leave to amend [R. 16]. The District Court of Appeal of the State of California, Second Appellate District, held that the complaint states a cause of action for damages for breach of contract under the common law principles of California [R. 32, 34] and that the covenant is constitutionally a valid agreement [R. 34], but that because of *Shelley v. Kraemer,* 334 U. S. 1, the courts of California may not permit petitioners to recover their actual provable monetary damages [R. 56].

The opinion of the majority of this Court held that although the contract sued upon is valid and although respondent would not be deprived of any of *her* constitutional rights by a judgment for the damages suffered by petitioners, yet respondent could assert constitutional rights claimed by "non-Caucasians, unidentified but identifiable" as possible future bidders for unidentified land from prospective sellers.

A. An Exception to a Jurisdictional Limitation Which Had No Exceptions.

An exception should not be recognized to a jurisdictional limitation which had no exception without the benefit of full and complete consideration in the briefs and arguments of the parties. The opinion of the majority in the case at bar is based upon the asserted rights of unknown persons with no standing in this litigation. In justification, the majority opinion has held on page 5, that the rule of standing and interest has application only in cases challenging the constitutionality of a statute:

> "The common thread underlying both requirements is that a person cannot challenge the constitutionality of a *statute* unless he shows that he himself is injured by its operation." (Emphasis added.)

This distinction between a statute and other state action is emphasized by the use of the phrase "state action" in the sentence preceding the one quoted, balanced against the use of the word "statute" in the sentence quoted, and is further emphasized by footnote number 3 which uses the word "statute" in the statement of nearly every case cited, and the other cases cited obviously involved a statute.

The distinction relied upon is again emphasized on page 6 of the decision in these words:

> "There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a *statute*, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed." (Emphasis added.)

The reliance upon a distinction between legislative action and other state action is further developed on page 6 of the majority opinion by the statement of a reason for the rule of "standing" applying only to tests of statutes:

> "One reason for this ruling is that the state courts, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable."

Another reason why the "standing rule" should be applied in testing statutes only is given on page 7 of the opinion to add to the validity of the distinction relied upon by the majority as a justification for exceeding the "con-

stitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies.'" (See Majority Opinion p. 5.)

> "It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the express will of Congress or that of the state legislature."

The distinction relied upon by the majority is expressly set forth on page 7 of the opinion in these words:

> "But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which *might* result in a denial of constitutional rights . . ." (The word *"court"* is emphasized by the opinion; emphasis has been added to the word "might.")

The Court has taken a very radical and far-reaching step in thus limiting the "standing" rule to litigation testing the constitutionality of statutes only. Only after thus limiting the "standing rule" to litigation testing statutes does the majority opinion state, "This is a salutary rule, the validity of which we reaffirm."

Aside from the constitutional authority of this Court to open its doors to the *friends* of persons affected by state action other than legislative action, the departure from the formerly invariable limitation must result in great mischief by permitting the Court to go out of its way to protect supposed rights, because in so doing the Court must assume situations which may never arise.

Thereby the Court will, in more ways than can now be foreseen, prevent litigants from enjoying rights which they might otherwise have enjoyed. This case is an example.

If this distinction is permitted to continue to represent the views of the Court, it will be applied by state courts to situations beyond the present contemplation of this Court; and many years, perhaps, decades, will be required for this Court to circumscribe the aberrations. The injustices suffered in the meantime could never be undone. It has been said that hard cases make bad laws, and unfortunately this is sometimes true. If the Court is not in sympathy with the petitioners or their exercise of their freedom, this should not cause it to depart from an invariable limitation on constitutional jurisdiction[1] and thereby open Pandora's box and loose its contents on future litigation.

Contract cases are not the only ones which will be revolutionized by the distinction spelled out by the majority opinion. All cases not involving a statute will become the arena for seriously championing the nebulous rights of strangers, unidentified but equally identifiable. The courts will feel free to rely on this shimmering image, the rights of strangers, undefinable, unlimited, having no existence in any justiciable set of facts, and relying thereon to destroy constitutional property rights "which *might* result

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[1]Mr. Justice Frankfurter, concurring in *Coleman v. Miller*, 307 U. S. 433, 461:

> "No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. Stearns v. Wood, 236 U. S. 75; Fairchild v. Hughes, 258 U. S. 126."

in a denial of constitutional rights . . . ." (Emphasis added.)

This distinction between the testing of state action by a legislature and the testing of state action by a court is particularly difficult to appreciate in view of the unanimous opinion of this Court in *Shelly v. Kraemer*, 334 U. S. 1, wherein the bulk of the opinion was devoted to showing that court action is state action the same as legislative action and must be tested by the same rules. Now we are told that the Constitution itself limits the jurisdiction of this Court in testing statutes[2] but not in testing the action of state courts.

Petitioners can find no authority for this distinction. The authorities cited by the majority opinion do not support this distinction. The majority cites the case of *Pierce v. Society of Sisters*, 268 U. S. 510, but this case does not recognize this distinction, nor any distinction, nor any exception to the constitutional limitation of the jurisdiction of this Court to the adjudication of the constitutional rights of the litigants only. In the case of *Pierce v. Society of Sisters* (*supra*) the Oregon statute deprived the appellees of a constitutionally recognized property right. The consideration of the rights of parents and guardians was only material to the determination of the reasonableness of the legislation. This is a question which must be dealt with in statute cases, but it has no constitutional significance in contract cases. The rights of litigants limited by legislation and the rea-

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[2]The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies.' See Coleman v. Miller, 307 U. S. 433, 464 (concurring opinion)." (See Majority Opinon p. 5.)

sonableness of the legislation are two distinct considerations and should not be confused; but petitioners respectfully submit that this Court has confused them in order to cite *Pierce v. Society of Sisters, supra,* in this contract case. Suppose the *Pierce* case involved a contract rather than a statute. Suppose the parents and guardians had made a valid contract among themselves to send their children to public school. If one of the parties breached this agreement and another party plaintiff could prove some damage, what *constitutional* defense could the party defendant raise? Could he cite *Pierce v. Society of Sisters* on the reasonableness of similar legislation or to show the constitutional right of the school upon which the *Pierce* case was based? That the *Pierce* case was decided upon the right of the appellees in conformity with the constitutional requirement is plain from the following language:

> "Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent *destruction of their business and property.* Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrance v. Thompson, *supra,* and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." (Emphasis added.)
>
> *Pierce v. Society of Sisters,* 268 U. S. 510, 536, 69 L. Ed. 1070.

The cases cited in this quotation conclusively establish the fact that the Court was adjudicating the rights of the appellees not that of strangers. *Truax v. Raich* will

be dealt with more thoroughly because it has been cited along with the *Pierce* case as authority for departing from the "standing rule." The other two cases will be touched only lightly.

In *Truax v. Corrigan* (1921), 257 U. S. 312, 66 L. Ed. 254, an employer was denied an injunction against peaceful picketing although all the facts required to state a course of action in equity were stated in the complaint. The denial was based solely upon a statute preventing injunction against peaceful picketing. The view of courts upon the constitutionality of such statutes has changed some since 1921, but that does not change the fact that the employer was asserting his own alleged constitutional rights, and the decision was based solely on the rights of the employer as they were then found to exist, not on the rights of strangers. The appellees in *Pierce v. Society of Sisters* showed their interest as clearly and immediately as did the employer in *Truax v. Corrigan, supra.*

In *Terrance v. Thompson* (1923), 263 U. S. 197, 68 L. Ed. 255, the appellants challenged the constitutionality of the Alien Land Law of the State of Washington. One of the appellants owned land and was prevented by the statute from leasing it to the other appellant. The other appellant was an ineligible alien prevented by the statute from taking the lease. (It should be kept in mind that this limitation was by statute without the consent of the appellants; it was not by contract to which all litigants were consenting parties.) The view of some courts, at least, have changed since 1923 as to the constitutionality of alien land laws, but that does not change the fact that the landowner and the proposed tenant were as-

serting their own constitutional rights not the right of strangers. The opinion in the *Pierce* case was expressly based upon the interest of the appellees which was expressly recognized to be as "clear and immediate" as that of the landowner and proposed tenant in *Terrance v. Thompson, supra.*

Suppose the *Pierce* case were based upon a contract among the schools themselves. Suppose they contracted among themselves by a valid contract not to enroll pupils from a certain district. Suppose one of the schools which executed the contract breached the contract, and another school which also executed the contract filed suit against the first school and could show actual damages. What *constiutional* defense could the defendant school raise? Could the defendant school cite *Pierce v. Society of Sisters, supra?*

These are not idle suppositions. The practice of citing statute cases to justify a decision in a contract case may in some situations have logical justification, but there can be no logical justification for citing a statute case solely for its language and reasoning in deciding the reasonableness of the statute. That language and reasoning has no constitutional relevancy to the enforcement of a contract between the litigants which may even seem unreasonable, because the litigants have accepted the terms and have been paid for their acceptance and have consented to be bound by the terms. If the terms are too unreasonable, the common law of the state or the statutes of the state will reach them, but the Constitution of the United States is not concerned with any such test of a contract as distinguished from a statute or other state action *not consented to.*

The majority opinion cites the case of *Truax v. Raich,* 239 U. S. 33; 60 L. Ed. 131, as authority for permitting respondent to rely solely upon the rights of an amorphous class. Petitioners respectfully submit that the opinion in *Truax v. Raich* recognized no exception to the "standing rule" but instead expressly brought the complainant within the rule and decided the constitutionality of the challenged legislation solely upon the rights of the litigant.

The *Pierce* case, *supra,* and *Truax v. Raich, supra,* belong in a well recognized class of cases which test the constitutionality of statutes by the constitutional rights of *litigants* whose constitutional rights are indirectly affected by the legislation, but nevertheless it is the constitutional rights of the *litigants* of the class to which *they* belong which is controlling on "standing," never the constitutional rights of an amorphous class of strangers.

In *Truax v. Raich, supra,* a statute of Arizona was about to take effect which purported to prevent anyone employing 5 or more persons from employing over 20% of aliens. Raich was an alien. His employer employed over 5 employees. His employer had notified him that he would be discharged when the statute took effect and that the statute would be the sole cause of the discharge. Raich brought suit to prevent this irreparable injury to him on the grounds that the statute was unconstitutional because it deprived him of his constitutional right to "the ordinary means of earning a livelihood" in violation of the Fourteenth Amendment to the Constitution of the United States.

> "It requires no argument to show that the right to work for a living in the common occupations of

the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

Truax v. Raich, 239 U. S. 33, 41, 60 L. Ed. 131, 135.

"The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law." (*Ibid.*, p. 43.)

Can this case stand as an example of a case decided upon the rights of an amorphous class, strangers to the action. The language of the Court is directed entirely to the constitutional rights of the appellee and brought the case within the uniformly recognized "standing rule." Clearly this case contains no language recognizing any exception to the "standing rule," but instead is cited in the same breath with, and for the same proposition as, *Ferrance v. Thompson*, 263 U. S. 197, 68 L. Ed. 255, and *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, in *Pierce v. Society of Sisters*, 268 U. S. 510, 536. Can these four cases be cited as authority for any exception to the "standing rule," much less the distinction between legislative action and court action relied upon by the majority opinion?

Suppose *Truax v. Raich, supra*, were a contract case. Suppose first that the employer had signed a valid contract with other employers by which they all agreed that not over 20% of their employees would be aliens. *We are not now concerned with non-federal questions.* Suppose the alien brought suit to require the employer to breach that contract based solely on the strength of

constitutional rights. Petitioners will not hazard a suggestion as to what the result would be. Whether or not this Court would cite *Truax v. Raich* as controlling is immaterial to the case at bar because such a case would not be analogous to the case at bar. In such a case the non-contracting, non-consenting alien would be identified, he would be before the Court, and his rights, if any, could be analyzed in an existing justiciable set of facts.

On the other hand, suppose that, after the employer signed the valid contract for consideration, he breached the valid contract. Suppose one of the other signers of the valid contract could show damages as a result of the breach and sued the first employer for those damages. Suppose the state court held that the contract was valid and that the complaint stated a cause of action for damages for breach of contract on common law principles. What *constitutional* defense would this signer of a valid contract have? He could not properly cite *Truax v. Raich, supra.* That case would not even be material to *his* defense to *his* contract much less controlling.

Every United States Supreme Court case cited by the majority opinion in the case at bar either recognizes the "standing rule" and expressly brings the claimant within it by showing his constitutional rights or else omits any consideration of standing at all. No case is cited wherein the Supreme Court of the United States has ever recognized any exception to the "standing rule," *i. e.*, the constitutional limitation upon the jurisdiction of this Court to the adjudication of the rights of litigants before this Court only.

One case is cited wherein a minority of the justices of the Supreme Court of California stated as dicta a claimed "well-defined" exception to the "standing rule." That case is *Quong Ham Wah Co. v. Industrial Acc. Comm.* (1920), 184 Cal. 26.

In that case an employer claimed that the workmen's compensation statute of California was unconstitutional as to injuries occurring outside the state to persons employed within the state for the reason that it applied to residents of California only. Four concurring opinions were written: One by Mr. Justice Lennon was concurred in by Mr. Justice Lawlor and Mr. Justice Sloane; one by Mr. Justice Olney; one by Mr. Justice Shaw was concurred in by Chief Justice Angellotti; and one by Mr. Justice Wilbur.

Mr. Justice Lennon stated one of "one or more of the recognized exceptions to the general rule enunciated in the *Estabrook* case" as follows:

> "Thus, where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality."

Mr. Justice Lennon feels that his is a recognized exception because of only two cases, *i. e., Greene v. State* (1908), 83 Neb. 84, 119 N. W. 6, and *Buchanan v. Worley*, 245 U. S. 60, 62 L. Ed. 149. In *Greene v. State, supra*, a defendant was convicted of violation of a statute which made that defendant guilty of a crime for extortion against a citizen of Nebraska but which would not punish a person who committed the same act

against a non-citizen of Nebraska. The Nebraska court thought that the only discrimination was against non-citizens and held that the defendant could assert the constitutional rights of the non-citizens because they could not themselves challenge the statute. The Nebraska court and Mr. Justice Lennon failed to realize that the statute applied unequally to the defendant without a reasonable classification and denied him equal protection of the laws. It is significant that in the forty-five years since the *Greene* case was decided it has only been cited twice by the courts of Nebraska and has never been followed by any other decision in Nebraska on the "exception" stated. Petitioners cannot find where it has ever been followed by any judge in the United States except the three out of seven justices in *Quong Ham Wah Co. v. Industrial Acc. Comm., supra.*

In addition to *Greene v. State, supra,* Mr. Justice Lennon understood the decision of this Court in *Buchanan v. Worley,* 245 U. S. 60, 62 L. Ed. 149, to be "precisely in point in the instant case." In other words, Mr. Justice Lennon thought that this Court had departed from the constitutional limitation upon jurisdiction commonly called the "standing rule" in deciding *Buchanan v. Worley, supra;* whereas, in fact, this Court expressly recognized the "standing rule" as controlling and based its decision upon the constitutional rights of the plaintiff in error.

After defining an exception dependent upon the existence of a class which could not test the constitutionality of the statute, Mr. Justice Lennon goes on in his opinion to hold that the Constitution prevents the limitation of the workmen's compensation statute benefits to

residents and automatically extends them to non-residents. Clearly, therefore, non-residents could file claims for compensation and, by successfully asserting their constitutional rights, obtain the benefits. (*Comm. Cas. Ins. Co. v. Ind. Acc. Comm.*, 110 Cal. App. 2d 83, 242 P. 2d 13.) This being the case, the condition upon which Mr. Justice Lennon's exception was based did not exist in that case according to his own opinion. Therefore, the application of the exception was erroneous and its discussion *obiter dictum.*

It is most significant that the *Quong Ham Wah Co.* case had been heard before by the Supreme Court of the State of California.

The decision upon the first hearing reported in 59 Cal. Dec. 18, was also written by Mr. Justice Lennon and concurred in by a majority of the then Court including Mr. Justice Olney and Mr. Justice Shaw. Mr. Justice Wilbur wrote a brilliant dissenting opinion. The first decision expressly overruled *Estabrook Co. v. Industrial Acc. Comm.*, 177 Cal. 767, 177 Pac. 848, and relying solely upon the exception claimed to the "standing rule," held the statute unconstitutional and reversed the award of the Commission. In his opinion after rehearing, Mr. Justice Lennon reaffirmed his exception to the "standing rule" by *obiter dictum;* and, after finding the statute constitutional by extending it to non-residents, he *affirmed* the award of the Commission.

Mr. Justice Shaw, *who had concurred* with Mr. Lennon's exception to the "standing rule" in the first opinion, did not concur when it was repeated in the second decision; but instead he wrote a separate opinion in which he only agreed with the *conclusion* that the peti-

tioners had standing and added his weight to the second part of Mr. Lennon's opinion, to wit, "that the provision of the Constitution of the United States, *ipso facto*, carries this privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect." This opinion was concurred in by Chief Justice Angellotti.

Mr. Justice Olney, who had also concurred with Mr. Justice Lennon's exception to the "standing rule" in the first decision overruling *Estabrook Co. v. Industrial Acc. Comm.*, 177 Cal. 767, 177 Pac. 848, did not concur in the second opinion; but, instead, he wrote a separate concurring opinion expressly rejecting the discussion of the *Estabrook Co.* case, *supra*.

Mr. Justice Wilbur's concurring opinion is in keeping with his dissent to the first opinion but concurs with the right of non-residents to the benefits of the statute.

It is plain that as to the first part of Mr. Justice Lennon's opinion in *Quong Ham Wah Co. v. Industrial Acc. Comm.* (1920), 184 Cal. 26, *the only part material here*, he spoke only for himself and two other justices, while four justices did not concur. Instead they wrote concurring opinions omitting the exception to the "standing rule" or rejecting it but concurring with the second part of Mr. Justice Lennon's opinion extending the benefits of the statute to non-residents.

It is plain therefore that the first part of Mr. Justice Lennon's opinion expresses the view of a minority of the justices; while the second part expressed the unanimous view of all the justices. Petitioners can find where the second, *i. e.*, unanimous, part of Mr. Justice Lennon's

opinion has been cited in nineteen cases including four decisions of this Court; but petitioners can only find five cases which have cited the first part of that opinion; and three of those cases cited it only to distinguish it. Those three cases are *Ex parte Nowak*, 184 Cal. 701, 195 Pac. 405; *People v. Globe Grain & Milling Co.*, 211 Cal. 127, 294 Pac. 5, and *Security-First National Bank v. Bank of America*, 7 Cal. 2d 771, 59 P. 2d 1023. The first part of Mr. Justice Lennon's opinion in *Quong Ham Wah Co. v. Industrial Acc. Comm., supra, i. e.*, the view of the minority of that court, has been cited and followed only twice since 1920, in spite of the frequency of cases where one of the litigants is barred from success by the "standing rule." Those two cases are *Pac. Indemnity Co. v. Myers* (1931), 211 Cal. 645, 296 Pac. 1087, and *Van Camp Sea Food Co. v. Newbert* (1926), 76 Cal. App. 445, 244 Pac. 949. Petitioners can not find where this view of the minority of justices has ever been cited or followed in any other jurisdiction except the opinion of the majority in the case at bar.

In *Pac. Indemnity Co. v. Myers, supra*, the only case in the Supreme Court of California to follow the alleged exception to the "standing rule," the exception was not contested or in other words, the petitioner lost that point and therefore, the case *by default*.

> "Counsel for the petitioner, however, do not dispute the existence of the rule, referred to by both parties as an exception to the general rule, that when

no member of the injured class can complain the question may be raised by anyone whose interests are affected."

Pacific Indemnity Co. v. Myers, 211 Cal. 635, 644, 296 Pac. 1084.

In the case of *Van Camp Sea Food Co. v. Newbert, et al.*, 76 Cal. App. 445, 244 Pac. 946, the Sea Food Company filed an application for an order allowing it to reduce 4,500 tons of sardines to fertilizer. The application failed to state the present capacity of the plant as required by the statute, but instead stated the future expected capacity. The Commission issued the order subject to a condition. Sea Food Company seeks to mandamus the issuance of an order without condition. The Commission points out (1) that the Sea Food Company's application is fatally defective, and (2) that the statute is unreasonable in permitting canners of sardines to reduce 25% to fertilizer but not permitting other packers the same right. The Court held that the conditional permit issued by the Commission was not based on statutory facts and was a nullity and that for the same reason petitioner's application did not justify any new permit, conditional or otherwise under the statute. Having thus disposed of petitioner's interest, the Court nevertheless proceeded on the strength of the exception to the "standing rule" expressed by Mr. Justice Lennon and a minority of the Court in *Quong Ham Wah Co. v. Ind. Acc. Comm.*, *supra*, and declared the statute unconstitutional.

In this connection petitioners wish to quote from page 6 of the majority opinion in the case at bar:

> "There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed. (Citing cases.) One reason for this ruling is that the state court, when actually faced with the question, *might narrowly construe the statute to obliterate the objectionable feature*, or it might declare the unconstitutional provisions severable." (Emphasis added.)

The *Van Camp Sea Food Company* case is a most excellent example of the wisdom of the statement quoted above, particularly the portion emphasized, in view of the rule of *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424, approved by all of the justices in *Quong Ham Wah Co. v. Industrial Acc. Comm., supra.* Similarly, because of this rule of the *Estate of Johnson*, one of the bail discriminated against in *Pacific Indemnity v. Myers, supra,* might assert his own constitutional right to equal privileges; this possibility removes the condition upon which the alleged exception is based. Yet the Court applied the exception and destroyed a remedial statute.

The folly of the exception to the "standing rule" expressed by a minority of the justices in *Quong Ham Wah Co. v. Industrial Acc. Comm., supra,* could not be more plainly illustrated than in that case and the two following it.

Yet that case is the only case cited by the majority opinion in the case at bar which recognizes any exception to the otherwise uniformly recognized and controlling constitutional limitation upon the jurisdiction of this Court. Can it be said that that case is an authority in this Court for any exception much less the distinction spelled out by the majority between cases testing legislative action and cases testing court action, since that case was a statute case and flies in the teeth of the reasons given by the majority opinion herein for the "standing rule" in statute cases.

Petitioners pray this Court to consider the pernicious effect upon litigation in all states if this indefensible opinion of a minority of the justices of the Supreme Court of California is elevated and adopted as the majority opinion of the Supreme Court of the United States and permitted to retain that position.

Petitioners respectfully recommend for the consideration of this Court the profoundly wise language of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U. S. 123, 149-150, 95 Fed. 817, 842:

> "The more issues of law are inescapably entangled in political controversies, especially those that touch the passions of the day, the more the Court is under a duty to dispose of a controvery within the narrowest confines that intellectual integrity permits . . . But in a case raising delicate constitutional questions it is particularly incumbent first to satisfy the threshold inquiry whether we have any business to decide the case at all. Is there, in short, a litigant

before us who has a claim presented in a form and under conditions 'appropriate for judicial determination?' "

Mr. Justice Frankfurter is referring to the presence of constitutional rights of the litigants themselves. Mr. Justice Frankfurter went on to find constitutional rights of the petitioners themselves. The majority opinion in that case also recognized that the "standing rule" required the petitioners to rely upon their own constitutional rights and held that such rights existed.

Petitioners respectfully submit that it is the Constitution of the United States which places the "standing rule" limitation upon the jurisdiction of this Court[3] and it is this Court which determines whether it will respect that constitutional limitation. It is the sacred duty of the Justices of this Court to observe and obey that constitutional mandate. This duty is not performed by stating that an exception exists. The language of the constitution does not disclose it. Nor does the combined wisdom of all past decisions of this Court support it.

Petitioners respectfully submit that a rehearing should be granted by this Court to reexamine the application of this "standing rule" in this case in the light of these considerations not heretofore advanced by petitioners who reasonably relied upon the belief that this rule was not open to question.

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[3] "The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies.'" (See page 5 of the opinon of the majority in the case at bar.)

B. The Court's Decision Is Based Upon Considerations Which Petitioners Did Not Have an Opportunity to Brief or Argue, to-wit:

1. **The Constitutional Rights of Classes,**
2. **Whether the Class Designated "Non-Caucasian" Has Any Constitutional Rights Which Might Be Affected by a Judgment for Petitioners,**
3. **Whether a Judgment for Petitioners Would Affect Those Rights if Any Exist.**

Petitioners did not have an opportunity to brief or argue the considerations upon which the decision was based for the reason that overwhelming authority in the form of countless decisions of this Court established that this Court had jurisdiction to consider the rights of litigants only. This invariably controlling rule prohibited argument based on the rights of strangers to the action as irrelevant and an unnecessary burden on this Court.

Perhaps the most scholarly and most highly esteemed treatise concerning the Appellate Jurisdiction of the Supreme Court of the United States published in the United States is "Reynolds Robertson and Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States," by Richard F. Wolfson and Philip B. Kurland, 1951, Matthew Bender & Company. Chapter 38 of that work is dedicated entirely to the rule which limited petitioners' briefs and arguments and begins as follows on page 541 thereof:

"§297. BASIC RULE—NECESSITY OF EXISTING OR CERTAINLY IMPENDING INJURY TO THOSE PERSONAL OR PROPERTY RIGHTS OF COMPLAINING PARTY WHICH ARE ENTITLED TO AND SUSCEPTIBLE OF PROTECTION BY JUDICIAL ACTION.

"So much of the discussion in the preceding chapters as dealt with the cognate requirement of case or controversy and with the subject of moot and abated cases has indicated the necessity that parties to cases heard in the Supreme Court establish their legal standing to invoke adjudication by that Court. But that discussion does not fully cover the requirements respecting the interest and status of parties. It is not sufficient that the issue presented be a live and not a moot one, that the parties be truly adversary, that the question urged be justiciable, and that the proceeding be one invoking the entry of a final judgment or decree. Something more has historically been necessary successfully to invoke the exercise of judicial power; *the showing of necessity for protection of rights personal to the parties before the Court—rights entitled to and susceptible of such protection.* As stated by the Court in the leading case of Tyler v. Judges of the Court of Registration (footnote, 179 U. S. 405, 406-407, 21 S. Ct. 206, 45 L. Ed. 252):

" 'The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver

an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

"'The very first general rule laid down by Chitty, Pleading p. 1, is that "the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." An action on contract (p. 2) "must be brought in the name of the party in whom the legal interest in such contract was vested;" and an action of tort (p. 69) "in the name of the person whose legal right has been affected, and who is legally interested in the property at the time the injury thereto was committed." As stated by another writer: "No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him, and on the other hand, a person is not properly made a defendant to a suit upon a cause of action in which he has no interest and as to which no relief is sought against him."'

"This historic view has from the outset been regarded as controlling the Supreme Court in the exercise of its original jurisdiction (footnote, See Sec. 302, *post*) and as constituting a component element of the statutes delimiting its appellate jurisdiction (footnote, Tyler v. Judges of the Court of Registration, 179 U. S. 405, 407, 21 S. Ct. 206, 45 L. Ed. 252; Marshall v. Dye, 231 U. S. 250, 257-258, 34 S. Ct. 92, 58 L. Ed. 206.)

"It results that in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, *it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal*

to the parties thereto, which are entitled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending. (Footnote, 'see all cases cited in this chapter.')". (Emphasis added.)

(1) The Constitutional Rights of Classes.

The decision of June 15, 1953, is based upon the rights of a class unrepresented by a member thereof as a party to this action and without any consideration of the rights of the class to which the litigants belong. Heretofore this Court has not permitted any presentation of the rights of classes because of the rule that only the constitutional rights of litigants are justiciable. Now, however, if the rights of one class is properly before the Court, the rights of the class to which the parties belong is also.

Freedom of association is a constitutional right as implicit and absolute as the right to be free from illegal imprisonment or restraint. If it is to be regulated, it must be by legislation which is reasonably related to a valid legislative purpose, and the determination is legislative.

Petitioners wish to point out, on behalf of the class to which they belong, that these racial restrictive covenants are not just examples of some wilfulness of man and do not merely represent man's inhumanity to man. It does not help us not to recognize that behind this are certain facts of life. We cannot escape facing those sociological facts if we open this case to the rights of classes, which petitioners feel should not have been done. But since it has been done, let us face the facts.

According to an article on page 4 of the February 26, 1953, issue of one of two Negro newspapers published in Los Angeles "approximately one-half of the arrests for narcotics in the city of Los Angeles involves Negroes."

This newspaper is not an irresponsible scandal sheet. It is published by one of our most respected Negro citizens who is a leader in all Negro affairs.

One of the reasons given in that article for the disproportionate number of arrests of Negroes for narcotics violations "is the fact that unlike most addicts, he dresses the part. A 'gas' cigarette holder, exaggerated clothes, and a 'real cool' attitude to everybody and everything, are standard equipment. Thus, the average Negro who has been wearing the 'monkey on his back' for any length of time can easily be spotted."

It is significant that the article uses the term "average Negro."

The principal reason cited by the article for the disproportionate number of arrests of Negroes is the unequal administration by the police department.

According to the "Uniform Crime Reports for the United States and its Possessions" issued by the Federal Bureau of Investigation, United States Department of Justice, Volume XXIII, Number 2, Annual Bulletin, 1952, United States Government Printing Office, Washington, 1953, 64% of the persons arrested in the 232 cities reported in 1952 for murder and non-negligent manslaughter were of the Negro race. 44% of the persons arrested for robbery were Negroes, 64% of persons arrested for aggravated assault were Negroes, 40% of persons arrested for other as-

saults were Negroes, 30% of persons arrested for burglary-breaking or entering were Negroes, 32% of persons arrested for larceny-theft were Negroes, 19% of persons arrested for auto theft were Negroes, 17% of persons arrested for embezzlement and fraud were Negroes, 34% of persons arrested for stolen property, buying, receiving, etc. were Negroes, 14% of persons arrested for forgery and counterfeiting were Negroes, 38% of persons arrested for rape were Negroes, 29% of persons arrested for prostitution and commercial vice were Negroes, 24% of persons arrested for other sex offenses were Negroes, 47% of persons arrested for violation of narcotic drug laws were Negroes, 59% of persons arrested for carrying, possessing, etc., weapons were Negroes, 29% of persons arrested for offenses against family and children were Negroes, 45% of persons arrested for violation of liquor laws were Negroes, 15% of persons arrested for driving while intoxicated were Negroes, 35% of persons arrested for disorderly conduct were Negroes, 17% of persons arrested for drunkenness were Negroes, 22% of persons arrested for vagrancy were Negroes, 69% of persons arrested for gambling were Negroes, 26% of persons arrested for suspicion were Negroes, 26% of persons arrested for all other offenses were Negroes.

Only 10% of the population of the United States, according to the 1950 decennial census are Negro. It is important to note that the largest percentages above appear in the crimes of violence: Murder, 64%; Aggravated Assault, 64%; Rape, 38%; Narcotics, 47%; Carrying and possessing weapons, 59%.

The following is quoted from page 2 of the "Report to the Governor's Council Meeting of May 25, 1953,"

by the California Youth Authority on its "Departmental Activities During April, 1953":

"RACIAL PROBLEMS CONTINUE ACUTE.

"It becomes increasingly apparent to persons with firsthand knowledge of the problem that tension between certain segments of the Los Angeles population is increasing. Part of the difficulty stems from the expanding population of minority groups with consequent overflowing into new neighborhoods. Incidence of individual fights between members of racial groups, vandalism in schools, and slight increase in gang activities in schools formerly free from such a problem, indicate the heightened tension in certain areas of the city. The Los Angeles Probation Department has assigned one full-time person to study the problem to determine its actual nature and scope. The Chief of Police of the Los Angeles Police Department has pointed out that last year's arrest statistics indicated a decrease in arrests in all categories of crime with the exception of those of violence and narcotics violation. In these last two categories, significant increases were noted.

"It is the opinion of some persons that part of the explanation of an uprising in those crimes is to be found in the increasing tension in certain segments of the population. Several service agencies, some of whom are leaders among the minority groups, are synchronizing their activities in an approach to a solution to this problem. Representatives from many of the service groups met with the Youth Authority parole staff in Los Angeles to discuss methods whereby the activities of the Youth Authority parole staff could be closely integrated with other groups from the community in an attempt to solve this racial problem."

These are some of the facts of life that force peaceloving people to join racial restrictive covenants. These covenants are valid and constitute a legitimate exercise of the "freedom of the individual in and under a democracy" which has "implicit in it, as an absolute, the freedom of association."

See:

Re Noble and Wolf, Ontario Weekly Notes (1949), at page 488.

Merely occupying houses in white neighborhoods is not all that Negroes want. This is apparent from the articles published in every national Negro magazine known to petitioners.

Attached hereto as Appendix "A" are the cover and pages 16, 17, 18 and 19 of the June, 1953, issue of the national Negro magazine "Color." This article complains of "red tape" which obstructs marriages between American Negro soldiers and white German women.

The June, 1953, issue of "Sepia," national Negro magazine, contains on pages 8, 9 and 10 thereof (see App. "B"), an article contrasting the marriage to a Negro of a white woman in California with two young children by a former white husband, with marriage to a white man of a Negro woman with two young children by a previous marriage. The father of the white children obtained their custody in a California court.

Attached hereto as Appendix "C" are the cover and pages 71, 72 and 73 of the July, 1953, issues of the national Negro magazine "Ebony," sold in June, 1953.

Every national Negro magazine known to petitioners on the newsstands this month, June, contains one or more articles, either featuring or displaying intermarriage between Negroes and whites and in other ways illustrating the example being set for Negroes. There is no room in the philosophy being taught to Negroes for the white man's personal freedom of choice of associates. This attitude among Negroes who move into white neighborhoods adds to the other factors which, equally understandably, make them unwelcome neighbors.

The pattern is the same in every neighborhood. When the first Negro moves in, there is a panic among the white residents to sell out and move away. "They can run but they cannot hide." This was the expression used by one of the columnists in reference to white people in his article in the February 14, 1952, issue of the Negro newspaper referred to heretofore. There is a market among Negroes for only a few of the homes thus offered for sale. The market among white people has disappeared at the price the property would have brought if the neighborhood were "lily white." This is the term used by Negro papers all over the nation for a neighborhood which does not have Negro residents. White people will not pay the same price for at least two reasons: First, there are fewer white people who are willing to buy into the neighborhood, with the consequent effect of supply and demand on the price; and second, those who are willing to buy into the neighborhood know they can get it for less. This second reason applies also to possible Negro purchases. The result is that when a house is occupied by Negroes, the neighboring property owners suffer severely, both in the value of their property to them and in its sale value on the market.

(2) The Class Designated "Non-Caucasian" Has no Constitutional Rights Which Might be Affected by a Judgment for Petitioners.

The right which the Court feels the unidentified class has is defined by the majority opinion in these words:

> "If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified by identifiable, of equal protection of the law in violation of the Fourteenth Amendment."

It is indeed a very startling idea that the unidentified non-Caucasians have constitutional rights in the private property of prospective sellers which are constitutionally beyond the reach of the record owners of that property. It is a surprise to the owner of the land in fee simple absolute to learn that unidentified strangers to him have constitutional rights in his property which he cannot contract away. It is even more surprising that this right should exist today although this prospective seller is not a party to this or any action and exist today even though this prospective seller has not now and may never in the future ever receive an offer to purchase from any non-Caucasian.

By far the most alarming aspect of the rule stated above is that unidentified non-Caucasians have a right to purchase private property from private parties free

from any consideration of race. If there is such a right, a non-Caucasian could file suit as plaintiff to have this right vindicated. Surely we have not come to a state of the law where valid contracts cannot be enforced in any way by anyone and valid rights in property cannot be asserted by the persons to whom they belong, but only by strangers?

Surely, it must be clear that unidentified non-Caucasians can have no right in unidentified property belonging to unidentified owners in fee simple absolute.

Petitioners respectfully submit that before such a rule be permitted to stand, a rehearing should be granted to petitioners so that the point may be thoroughly brief and argued.

(3). Judgment for Petitioners Cannot Affect Any Supposed Rights of Unidentified Non-Caucasians.

The language of the majority opinion defining the supposed rights of non-Caucasians in unidentified property is quoted again:

> "If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians."

This statement presupposes that all property is subject to restrictions, for only in that event would non-Caucasians be unable to purchase, own, and enjoy property on the

same terms as Caucasians. The facts are that all public housing is unrestricted, all F. H. A. housing begun since February 15, 1950, is unrestricted [see R. 56], a large percentage of restrictive covenants have expired by their terms, a large percentage of restrictive covenants are worded in such a way that they can only be enforced in equity, which would be barred by the *Shelley* case, finally, a large percentage of the few covenants which could be enforced in damages, could not be enforced against the present owner because he is not the original signatory[4] and therefore he would have no hesitancy to sell to non-Caucasians.

The supposed effect of a judgment for petitioners upon non-Caucasians is entirely speculative. There is nothing in the record to indicate that non-Caucasians cannot purchase all the homes they can afford from F. H. A., unrestricted property, property subject to unenforceable covenants and property developed by their own entrepreneurs. Petitioners should be given an opportunity to

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[4] "As a general rule, liabilities cannot be transferred, nor assigned; but there is an exception to this rule in case of covenants running with the land, in which case a grantee is liable for breaches which occurred *while he holds the estate in the land.*" (Emphasis added.)

15 C. J. 1301.

"Sec. 1466. Who are not. No one, *merely by reason of having acquired an estate subject to a covenant* running with the land is liable for a breach of the covenant before he acquired the estate, *or after he parted with it or ceased to enjoy its benefits.*" (Emphasis added.)

Civ. Code, Sec. 1466.

see the basis for claims that non-Caucasians cannot purchase, own or enjoy property. Petitioners should have an opportunity to refute those claims. It should be remembered that this is the first time that the Supreme Court of the United States has decided a case upon the alleged rights of a class not represented by a member before the Court. For that reason alone, a rehearing should be granted to permit a consideration of the rights of other interested classes, particularly the one to which petitoners belong.

Petitioners respectfully submit that in considering the rights of these respective classes, the Court should be mindful of the following statement of this Court in the *Civil Rights Cases,* 109 U. S. 3, 25:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary mode by which other men's rights are protected."

Petitioners respectfully submit that much of the unrest and friction now existing and growing between the races would cease if the leadership of certain minorities would not so persistently and fanatically urge their members to insert themselves like a sliver under the fingernail of white society.

For the reasons set forth hereinabove it is respectfully urged that a rehearing of the above-entitled cause be granted and that, upon such rehearing, the judgment of the District Court of Appeal of the State of California, Second Appellate District, be reversed and the cause be remanded for trial.

Respectfully submitted,

JOHN C. MILES,
J. WALLACE MCKNIGHT, and
CHARLES LELAND BAGLEY,
By J. WALLACE MCKNIGHT,
Counsel for Petitioners.

Certificate of Counsel.

I hereby ceritfy that the foregoing petition for rehearing is presented in good faith and not for delay.

J. WALLACE MCKNIGHT,
Counsel for Petitioners.

GISELA, 14, and her six-year-old half brother enjoy playing out-of-doors, doing a balance act on a sidewalk railing near their home.

the court will oblige him to contribute to the support of the child until it reaches the age of 16. The amount of the support awarded will vary in each case, and will usually depend on the economic status of both parties.

It is a certainty that all over the world at present men are searching their souls and thinking back to rosier "never had it so good" days. And many others are living their normal lives, little suspecting the events now in motion which may present them with a white envelope of trouble and thought this year 1953.

FOR SOME COUPLES, white and colored, the new provision may provide the spark which will bring forth happy reunions and the traditional "happiness ever after." Whatever the outcome, the new provision is certain to raise controversy and discussion, once the cold wheels of justice begin their international duties. THE END.

COULD SHE BE JEALOUS of his call? Torsten says "don't bother me" to Gudrun, his blonde kindergarten girl friend.

NOT READY for the Army yet, Torsten poses with his daddy's uniform head piece.

ICE CREAM and Gene Autry. How American. Torsten teaches his pals how to be smart cowboys.

BEFORE TORSTEN CAME to school he spent much of his time in this German kindergarten playing with toys sent from overseas by USA-Welfare organizations.

Color

THE MEN THAT RUIN WOMEN

JUNE 1953

25¢

RED TAPE STOPS GIs IN GERMANY FROM MARRIAGE

FIERY FRANCINE

The Man who Did More for Baseball than Jackie Robinson

RED TAPE STOPS G.I.s IN

POSING FOR FAMILY portrait are Sfc. John A. Wall, baby Astrid, Mrs. Emmy Schucht, Torsten and white daughter, Gisela. Mrs. Schucht is a divorcee.

Mixed Couple in Frankfurt Not Allowed to Marry Under U. S. Army Rules; Girls Can Now Sue for Kid's Support

GERMANY FROM MARRIAGE

by Golf Dornseif

FOR THE FIRST time approximately 3,500 colored six-year-old boys and girls had to register in the Bonn-Republic's schools last spring 1952 with some 2,000 more going to the class rooms Easter time 1953.

One of these kids is Torsten Schucht-Wall, star of our picture-story and a Frankfurt citizen.

TORSTEN'S FATHER is Sfc. John A. Wall, a 32-year-old US-Army truck-driver stationed in Nuremberg, Germany. The boy's mother, 44-year-old German housewife Emmy Schucht got a divorce from her German husband in 1945 to live with Sfc. Wall.

The German-American couple, who are not allowed to marry under present US-Army laws, have three children. They are young Torsten, a nine-months-old girl, Astrid, and 14-year-old Gisela, white, daughter of Frau Schucht's German ex-husband.

THESE FIVE PEOPLE live in Westhausen, a Frankfurt suburb, and Torsten and Gisela go to Praunheim Elementary School a few blocks from their four-room apartment. Frau Schucht is a secretary employed with a local German firm and her eldest daughter, Gisela, takes care of the household while Mama works in a downtown office.

Although John and Emmy are unable to marry for the time being they live as happily together as possible with John getting many overnight passes through the channels of an understanding CO who knows how bitter it is to live separated in different towns.

HAVING LITTLE or no knowledge at all concerning the strange paths of US-Government and Army-routine, German school and welfare officials have already stopped wondering about what servicemen and officers may do or not do in the Bonn-Republic. Problems like marriage, adoption, etc., are handled in so many different ways depending on citizenship, unit commander, and good will of numerous other people that things are mixed up like never before.

As for the Schucht-Wall-family all are well-respected citizens of their community and treated very friendly by the neighbors in Westhausen. Nobody has ever started discriminating the children or Mrs. Schucht because of their inter-racial relations with Sfc. John A. Wall. On the contrary, Torsten has white playmates by the dozens who don't care a damn about his chocolate complexion.

GENERALLY SPEAKING an estimated 96,000 US., British, and French servicemen have fathered illegitimate children—5,000 of them colored—during the past seven years in Germany.

Some of these fathers have married the mothers, some have acknowledged paternity before an Allied court, some have simply and voluntarily agreed to support their children and the mother as in the case of Sfc. John A. Wall who can't get a marriage certificate although he would like to marry his fiancée Emmy Schucht as soon as possible.

BUT THE MAJORITY have disappeared beyond the seas and across the borders, leaving their children—and a large scale problem—behind in Germany. The unwed mothers of these children have fought a long, uphill battle during the last seven years for the right to sue their khaki-clad Romeos for support of the children.

Their battle has now been won.

WITH RATIFICATION of the Bonn-Republic Contractural Agreement with NATO this Spring, German girls are now free to sue their tan ex-lovers in order to get paid the amount of money needed for raising the occupation kids.

Some 45,000 white and colored Americans, 40,000 Britishers and 10,000 Frenchmen, many of them colored too, face the possibility of a court suit or a settlement based on actions which may date back seven years to the early, lax days of the "love 'em and leave 'em" tradition of all conquerors.

ALTHOUGH 600,000 illegitimate children have been born in Germany since the end of World War II, the 96,000 white and colored occupation babies have constituted a special problem because of the lack of specific legislation providing for their care. Up till now the decision to accept moral and legal responsibility has rested squarely with the father.

Marriage has provided only an occasional solution to the many temporary arrangements, partially because of strict laws dating back to early occupation days which required (*Continued on next page*)

THIS IS ASTRID, nine-month-old sister of Torsten.

PROMINENT MEMBERS of newly established "League for the Protection of Colored German Nationals Against Racial Discrimination" are Mrs. Bertha Roemer, Dr. Wilfibald Schmidt and Heinz Kromer. They are high-ranking school officials.

SFC. JOHN AUSTIN WALL and his son, Torsten, are the best of pals. Since the German side of the family could not understand English, John had to learn German which he now speaks fluently

"DADDY" WALL enjoys wearing German house jacket, typical for husbands resting at home. Torsten and Astrid feel like riding on horseback.

SCHOOL REGISTRATION was an exciting affair for Torsten. Norbert Herold (left), Torsten's kindergarten-mate; Torsten, Mrs. Emmy Schucht, mother; and school principal Dr. Wilhelm Luh sign documents.

TORSTEN IS VERY POPULAR with his classmates in Frankfurt's Praunheim-Elementary School. His best playmate, Norbert, sits next to him scribbling on his slate.

Red Tape Stops G.I.'s In Germany from Marriage

(*Continued from page* 17)

that a soldier married to a German national leave the area within a 90-day period.

Permission Required

Army permission to marry is still required, visa permission, which demands checking through consular channels and compliance, with all visa restrictions, must also be obtained.

DESPITE THE ASSISTANCE of chaplains and other interested officials, few marriage papers, even hand-carried applications, can be accomplished in less than six weeks. Many a romance has blossomed and withered before an original application has been returned.

Some couples, faced with the choice of "being legal" and leaving, or "shacking up" and staying, have taken the easier road, only to have an abrupt transfer catch them with their paper work down.

STATISTICS SHOW that 25 percent of the departed Allied fathers have sent irregular voluntary financial aid to the girls they wooed and won in Germany. But for the other 75 per cent of the mothers things are fairly tough.

ITEM: Only one out of every three unwed mothers receives relief with the average check totalling about 25 Deemarks per month ($6.00).

ITEM: Many of the mothers have either low-paying factory or office jobs, but many more are among Germany's more than 1,000,000 unemployed.

Morale Problem

The Armed Forces, in recognition of the morale problem which occurs when fathers are separated "suddenly from their family", have granted morale leaves to such men to enable them to return to Germany and marry.

RATIFICATION OF the contractual agreements by the Bonn-Parliament is the beginning of countless individual court cases which will be both time-consuming and expensive.

BIGGEST COST for the German women will be in hiring legal representation in the foreign countries involved. Affidavits testifying to knowledge of their affair by former friends and neighbors will be solicited. Legal experts say that love letters in the handwriting of the father will be especially valuable to the mother, and if a child is mentioned, the case is usually decided.

Such paternity suits could be embarrassing for many a (now) older and wiser man, possibly settled down in his homeland with a local wife and other children. Many such "respectable" men are expected to settle the case out of court to save expenses as well as to keep the German-speaking skeleton hidden in an other-world closet.

BUT IF THE father decides to fight the case and loses,

TORSTEN'S FIRST TEACHER, Ludwig Weber, is member of Society for Better Understanding of Christians and Jews and other organizations promoting cooperation with minorities.

IT COULD BE ART but only Torsten knows as he scribbles on his slate instead of doing home work for next school-day.

SEPIA
RECORD

WAS WILLIE MCGEE
REALLY GUILTY?

INTERRACIAL
"Problem"
MARRIAGES

Grace del Marco
Model

ARE NEGRO
BIG LEAGUERS
SLIPPING?

June
25c

True Story -- "My Son Was INSANE!"

INTER-RACIAL

All marriages Can these

By BETH MICHAELS

Interracial marriages have always been regarded as social T-N-T.

They've been "freak" affairs—viewed by the public with a strict "hands-off" attitude. Shunned by families (on both sides usually), and friends, the principals involved have been outcasts.

Thus, any interracial marriage starts off with two strikes against it. Here are two of the most recent victims of this social stigma.

And here are the facts in each union.

Do you think they can last?

BECAUSE she married a Negro, a California mother, Mrs. Barbara R. Smith, is today faced with the loss of her two children.

Divorced from her white husband, she was given custody of their children without any protest or dissatisfaction.

Everything went along smoothly and everybody was happy, until she married a Negro. Then, trouble started.

Her ex-husband filed a petition on the grounds that "change of circumstance" for the children warranted his custody. He also protested that the man she married was of questionable character. In court, it was pointed out that there were two charges against Willie Taylor, the Negro husband. He was arrested while playing poker in a private home in 1946, and he is a Negro.

The father charged that his daughter, 10-year-old Amanda Smith, is living in a crowded apartment and as a result, is in poor health. It was established through testimony of physicians, psychiatrists and her school teachers that Amanda is in excellent health—both physically and mentally. The child testified that she'd rather live with her mother and that her stepfather was very kind to her and she is fond of him. It was established that the child's living conditions are equal to those of her former father and mother.

This Woman Married a Negro--

MRS. BARBARA Smith nearly lost the custody of her two white children because she married a Negro man.

PROBLEM MARRIAGES

of this type create problems. couples overcome them?

Her welfare has been checked in every way and found to be satisfactory.

Yet, the problem remains. The child testified that she did not see anything wrong with her mother marrying a Negro — but in this case, it's not what she thinks, but what her friends and relatives think, that really matters. How will they treat her?

This little girl is torn between the love for her father and respect for her step-father. She wants to obey her mother and her father, but how can she when both have such different beliefs? Mr. Smith, Amanda's father, testified that the child's grandmothers, aunts and uncles have nothing more to do with Mrs. Taylor since she has married a Negro. Children always consider it a treat when they are taken for a visit to grandmother and grandfather's house. In fact, they enjoy visiting any relative. Can you imagine how she feels now that these visits have been denied?

Mrs. Taylor had worked at the United Motor Service in Berkeley for two years, but as a result of the publicity caused by the case, she lost her job.

Amanda testified that she loves her little half-brother, John, as much as she does her full-blooded, white brother, Eric. But as time goes on, it will be harder for her to prove it. She'll discover that while they have the same mother, there'll be many times when they won't be allowed to go through the same doors or associate with the same people.

If there are other children born to the Taylors what affect will it have on their lives? They have a chance to be white, but—no matter how white they are when born, they can be nothing but Negro.

(Please Turn Page)

This Woman Married a White Man!

THINGS WERE a little smoother for Mrs. Alberta S. Briggs, a former barmaid, who married a millionaire.

Millionaire marries barmaid

Will their parents' love and understanding be broad enough to make them want to be part of this mixed family or will they want to escape the complications?

If Mr. Taylor was a wealthy man, it would make things easier for the family but since he is not, all they can do is make the best of the situation. The luxuries that could be bought to help brighten the children's lives cannot be afforded.

Mrs. Taylor has an order from Judge Harold Jacoby of Contra Costa county restraining Mr. Smith from taking the children, Amanda, 10 and Eric, 3 out of the state, while the appeal is pending.

Mrs. Taylor will carry her fight to the Supreme Court if it is necessary. If she wins the case, that does not mean she will win peace and happiness with her family. The people around will see that she does not. After the trial is over, she'll still be on trial as far as they are concerned. Her family will be the center of gossip and curiosity.

We must admit that marriages between Negroes and white create larger problems than any other interracial marriages. The sad part about them, is that the children are the ones who usually suffer most. Their parents ignore the risk of racial conflict and get married. They may love and understand each other, but when the children come along, instead of serving as a tie between the races, they become a problem, because there is no "in-between" race. They are not white and they are not Negro. It is easier for them to call themselves Negro because there are all shades of color in the Negro race and also, this race will accept them quicker than the white one.

The children involved in the marriage between Mr. Ernest Briggs, the 67-year-old multimillionaire to Miss Alberta Sheffield, face a similar problem. Mrs. Briggs is the mother of two children, James, 3 and Leela, 2 by a previous marriage. The couple had been married a week before the news leaked out. Yet, when it was made public, the father of the two small children did not rush in to file a petition to take the children away from the mother because she'd married a white man.

It is true that the family is plagued by reporters and photographers—and even people who call because they are curious.

Everyone realized it was an unusual incident from many angles. First it was an interracial union. Secondly, it is the "Cinderella" type of wedding—since Mr. Briggs is a member of a moneyed auto parts family.

Thirdly, there's a vast margin between their ages—she being 32 and he, 67. We must admit that the publicity given them was far different from the cruel treatment given the marriage of the Taylors.

It has not thrown her two children into as much confusion and bewilderment. While the Taylors are sitting in constant tension, waiting and hoping for the best, the Briggs family is enjoying life and looking forward to a happy future together. The two children are being adopted by Mr. Briggs so they can share his name as well as his love and liberality. So far, in this case, there are no problems to mar this marriage.

Why is there so much difference in the two cases? Does it mean that enough "cold cash" can prevent "hot gossip" from harming you? Or does it mean that the public feels that one mother reached up—while the other stooped down? What is your opinion in either case?

ERNEST BRIGGS talks over old times with dancing m.c., Shorts Davis.

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WHAT HAPPENED TO THE JONES BROTHERS?

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LONDON'S SUNSET CLUB

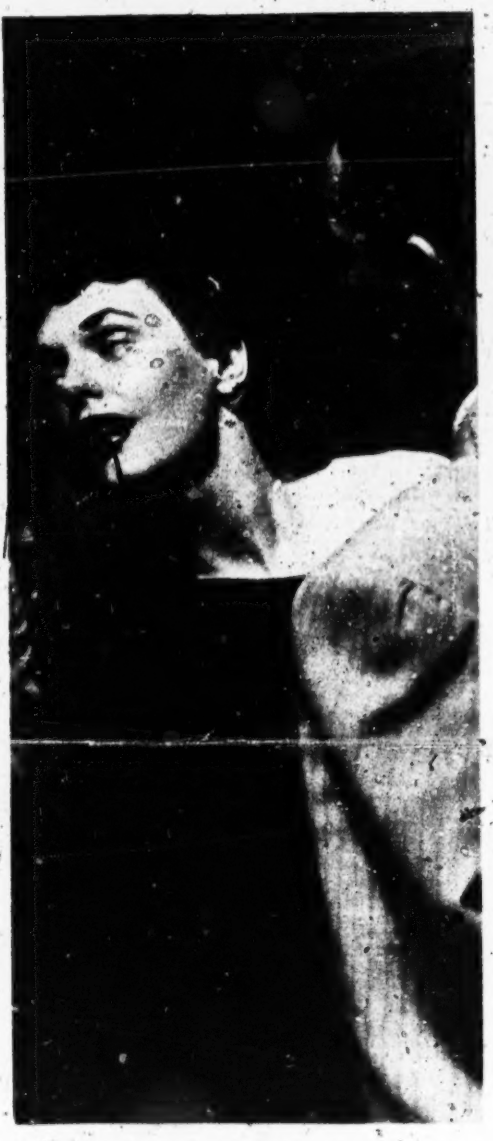
Liquorless beige-and-blonde nitery is popular attraction

LONDON'S night clubs were carried to the peak of a glittery, noisy and liquory boom during the American "occupation." Today the melody lingers on in an institution brand new to England—the bumptious beige-and-blonde clubs, American style. Like Coca Cola and chewing gum, this startling import is now an integral part of the English social landscape. They do an exceptionally brisk business, catering to Negroes and white people who wish to frolic together in a congenial atmosphere.

Most typical of London's beige-and-blonde places is the Sunset Club, which has become so popular that any taxi driver's eyes brighten with recognition at the mere mention of its name. Situated on Carnaby Street in Soho, near famed Piccadilly, it is a low-ceilinged basement of a bombed-out building.

Serving only sandwiches and cokes (liquor is forbidden) and having just a passably fair floor show, the Sunset Club has just one main attraction. It is the spot where white women can go and dance freely with Negro men. And the club is packed seven nights a week.

Dancing star of Sunset Club show is Vera Antia, who entertains customers with a sensational shake dance done to the accompaniment of a five-piece jump band. Dancer from Cardiff, Wales, has been at club two years.



Dancing couples at Sunset Club include titled ladies as well as factory and shop girls. They have one thing in common—they love to dance with Negroes. Club has 500

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Club is often so crowded that seats are at a premium. Here Sgt. William Evans from New York lends his lap to tired dancer Nancy Gamey, a Scotch girl now in London. Girl beside Evans is from France. Club is open from 11 p.m. until 4 a.m.

BRITISH GIRLS WHO BELONG

THE GIRLS who frequent the Sunset Club are a loyal and articulate contingent—almost fanatical in their devotion to the club, making no bones about their associations with Negroes. They are unanimous in the opinion that colored "boys" (as they call all swains of whatever color) are much more attentive and have much better manners than white men—and, most of all insist that Negroes have no peers as dancers.

They fail to understand color bars, especially those that exist in England. They even have shrugged off the boycott against them at the American Air Forces dances and clubs. The American girls who frequent the place have seemingly adopted the outlook of their English cousins.

The Sunset is no less attractive to the Negro GIs. "I first arrived here six months ago," explained one fellow, "and I was very unhappy about the whole thing at first. Every pay night I would come down to London or Oxford and really get clipped. If I wanted to talk to a girl, it would cost me $5 a round of drinks and I spent $30 before the night was over, and when I ran out of money, the girl went for another sucker. Then, I found out about the Sunset. It only cost me $3 to join and 50c admission charge each time I come. Here I drink cokes

Vigorously rug-cutting. Belgian girl Pearl Bram comes to Sunset Club every night, says she likes fast dancers. Negro GIs brought rug-cutting to Europe.

Sitting out dance to listen to hot saxist Al Timothy, Lady Luvina Dudley-Bateman is typical of the newsworthy names that frequent the Sunset Club. Lady Dudley-Bateman is a regular member of club, loves to dance with West Indians.

TO CLUB IGNORE RACIAL BARS

at 25 cents each and I can have a good time even if I am broke. Besides, the girls here are nice—not the kind you find in bars."

The inconspicuous Negro host, Gustavos Leslie, who was born in Jamaica and lived in the U. S. for a spell, regards himself as something of a missionary in conducting the place. He came to London six years ago on a visit. He liked the city so well that he settled down and married a Danish girl who assists him in operating the club. His prime motive in opening the place, he says, was to provide a place where lonely Negroes could come and have fun cheaply. He remembers the days when he himself was a stranger to the city, so much so that when the cast of *Porgy and Bess* was having trouble finding accommodations, he stepped in and put them up at his own place. The Sunset Club, which performs a unique racial function in London, is his way of concretely helping fellow Negroes.

When Leslie first opened the Sunset Club there were very few Negro GIs around London and most of the club's membership was made up from the city's rather large West Indian group. Many were young students attending British schools. When American Negroes were brought to Upper Heyford and Lackenheath Air Force bases in number, many of these soldiers joined the club which stays open seven nights a week.

Warm friendships and love affairs have developed between couples who met at club. White Americans sometimes object to free and easy mingling of races at the Sunset.

Continued on Next Page

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Searching patrons for concealed liquor, Sunset proprietor Gustavos Leslie is cautious about conducting a respectable club to win police approval. Unlike most Soho district clubs, the Sunset vigorously bars admittance to all known prostitutes.

Looking as "sent" as any American jitterbug, English girl dances with Air Force soldier. In addition to the shop and factory girls who are there nightly, Sunset attracts a number of the footloose married women out for a clandestine night.

Lingering goodnights at Sunset's doorway at 4 a.m. closing time are common. Leslie changed name of club from Moonglow to Sunset because as he says, "The new name signifies a bright horizon and makes me feel much more optimistic."

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